# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~476.~~ 200

THE CONGRESS AND EMPIRE SPRING COMPANY, PLAINTIFF IN ERROR,

vs.

DEXTER A. KNOWLTON, JR., AND CHARLES D. KNOWLTON, AS ADMINISTRATORS OF DEXTER A. KNOWLTON, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 14, 1878.

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1 *Summons for a money demand on contract.*

N. Y. supreme court.

DEXTER A. KNOWLTON, PLAINTIFF,
*against*
THE CONGRESS & EMPIRE SPRING COMPANY,
defendant.

To the defendant:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of you answer to the said complaint on the subscribers at their office, number 10 Wall street, New York City, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of twenty-eight thousand two hundred and twenty dollars, with interest from the twentieth day of February, one thousand eight hundred and sixty-six, on $13,980, and from February 1st, 1867, on $4,240, besides the costs of this action.

2 Dated Sept. 13th, 1869.

STARR & RUGGLES,
*Plaintiff's Attorneys.*

3 *Complaint.*

Supreme court, county of Kings.

DEXTER A. KNOWLTON
*ag'st*
THE CONGRESS AND EMPIRE SPRING COMPANY.

The amended complaint of Dexter A. Knowlton, plaintiff, by Starr & Ruggles, his attorneys, respectfully shows to this court for a first cause of action—

That the defendant, The Congress and Empire Spring Company, is a corporation duly organized under the act of the legislature of the State of New York, entitled "An act authorizing the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17, 1848, as extended in its operation and effect by an act passed March 31st, 1863, and was made subject to all the provisions, duties, and obligations contained in the said act of February 17th, 1848, above mentioned, and became entitled to all the benefits and privileges thereby conferred.

That the capital stock of said corporation as originally fixed
4 and limited was one million of dollars, divided into ten thousand shares of the par value of one hundred dollars each, and was issued in payment for property purchased by the trustees of said corporation, and thereby became full stock and not liable to any further calls.

That the said defendant being desirous of increasing its capital stock by the addition of two hundred thousand dollars thereto, the following resolutions were passed at a meeting of the board of trustees thereof, on the 11th day of January, 1866:

"Resolved, That the capital stock of the Congress and Empire Spring Company be increased $200,000, for the purpose of building a glass

factory for making bottles for bottling the water of the Congress Empire and Columbian Springs and creating a working capital.

"That the books of the company be opened for subscriptions to said stock and that each stockholder allowed to take one share of said new stock for every five shares he now holds, and that, when he pays eighty dollars on each share, the company will issue to him a certificate as if for full paid stock."

5 That a meeting of the stockholders of the defendant was called pursuant to the above resolution and was held on the eighth day of February, 1866, at which stockholders representing eight thousand five hundred and fifty-two shares of stock voted in favor of the increase, and holders of one hundred and fifty-six shares voted against it.

That a meeting of the board of trustees was held on the 8th day of February, 1866, at which the following resolutions were passed:

"Resolved, That a call of twenty per cent. on the new stock be made, to be paid at the office of the company on the 20th day of February, 1866. That the books of the company be opened at once for subscriptions to that stock, and that each stockholder have the privilege of taking one share of the new stock for every five shares they hold of the old, provided they take said new stock and pay to the company twenty dollars on each share on or before February 20th, 1866, and if any stockholder fails to pay the company twenty dollars on each share of the new stock they are entitled to, on or before February 20th, 1866,

6 they shall forfeit all claim to said new stock.

Resolved, That, provided there is, on the twentieth day of February, 1866, any of the $200,000 of new stock to be issued by this company, that the stockholder who is entitled to it has failed to pay in to the company twenty dollars on each share, it shall be equally divided among the stockholders in proportion to the amount of stock held by them who have paid into the company twenty dollars on the portion they were entitled to, and that the secretary shall at once advise each stockholder who is entitled to one share or more of said stock, the number of shares they are entitled to, provided they pay to the company twenty dollars on each share before March 1st, 1866; the company shall issue the stock to said stockholders, and if they fail to pay twenty dollars to the company on each of said shares allotted to them, then the president and secretary shall let any stockholder have said stock who will take it and pay twenty dollars on each share, and if there is more of said stock applied for than there is left to be taken within

7 three days after the 1st of March, it shall be divided by the president and secretary between those applying, in proportion to the amount of stock held by them."

That pursant to the above resolutions, a subscription agreement in the words and figures following, to wit, was issued by the trustees of said company:

"CONGRESS AND EMPIRE SPRING COMPANY.

"*Stock subscription.*

"We, the undersigned, hereby covenant and agree to take the number of shares of the capital stock of the Congress and Empire Spring Company set opposite our names respectively, and pay the company for each share eighty dollars in instalments as called for by the directors of said company, and if we fail to pay as called for by said directors, for sixty days after the time it is called for, we agree to forfeit to

the company all sums that we have paid on said stock. The Congress and Empire Spring Company agree and bind themselves to pay interest on all sums paid on said stock, to the holder, from the day it is paid up, to February 1st, 1867, and on the eighth day of February, 1867, for all of said stock that eighty dollars has been paid on each share, they agree to issue a certificate to the holder for full paid stock, when the stock shall draw dividends and be treated the same as other full paid stock; provided, there is any of said stock that there has not been $80 paid to the company on each share, February 1st, 1867, and said stock has not been forfeited to the company, the company shall be bound to pay only the interest on the sums paid on said stock until the first dividend has been declared after $80 has been paid on each share. Said company also agree that the holders of said stock shall be entitled to vote at all times the same as on full paid stock, provided all calls due have been paid.

"SARATOGA SPRINGS, *February 8th*, 1866."

That said agreement was signed by C. Sheehan, among others, as a subscriber for six hundred and ninety-nine shares of the said new stock, and on the 20th of February, 1866 (pursuant to an agreement between him and the plaintiff that said subscription should be for the benefit of the plaintiff and that he, said plaintiff, should assume the same, and that the same should thereafter stand in his name), plaintiff paid to the secretary of the said company $13,980, being the first instalment of 20 per cent. thereon, and received the following receipt therefor:

$13,980.] "OFFICE OF THE CONGRESS & EMPIRE SPRING CO.,
"*Saratoga Springs, Feb. 20th*, 1866.

"Received of D. A. Knowlton, esq., thirteen thousand nine hundred and eighty dollars, it being the first installment of twenty per cent. on six hundred and ninety-nine shares of stock standing in the name of D. A. Knowlton on the books of the Congress & Empire Spring Company, and said company agree to pay interest on said thirteen thousand nine hundred and eighty dollars from this date up to February 1st, 1867, provided the amount now left unpaid on said stock is paid when called for by the directors of the company.

"W. R. JOHNSON, *Sec'y*."

[2 c. stamp.]

That calls for other installments were made, but not responded to, and on the 25th of January, 1867, the trustees passed a resolution in substance as follows:

"Resolved, That the seven hundred and twelve shares of new stock, viz, six hundred and ninety-nine shares subscribed by C. Sheehan, and standing in the name of D. A. Knowlton, &c., &c., &c., on which calls have been made and remained delinquent for over sixty days, are hereby declared forfeited to the company in accordance with the terms of subscription."

That a meeting of the stockholders of the said defendant was held on the 7th of August, 1867, at which the following resolution was passed:

"Resolved, That the capital stock of this company be reduced to the original capital of one million dollars, and that the trustees of the company be and hereby are authorized to adjust with the owners or holders of the two thousand shares heretofore increased or intended to be

11 added to the capital stock or any part thereof, or with their assigns, for retiring said stock so authorized to be increased, on such terms and conditions as the said directors shall deem for the interest of the company."

That a meeting of the board of trustees of the said company was held on the same day, at which the following resolution was adopted:

"Resolved, That the authority this day conferred upon this board by the stockholders of this company, in regard to the retiring and cancelling of the stock of this company down to the sum of one million dollars, is hereby conferred upon the executive committee, and said committee are hereby authorized to adjust the claims of all persons holding receipts for payments on the new stock of the company on such terms, as to price and payment, as shall be deemed by said committee for the best interest of the company."

That the said executive committee, on the 27th of March, 1868, adopted the following resolution:

12 "Resolved, That the Congress and Empire Spring Company issue five-year coupon bonds of the form adopted at prior meeting insufficient amount to retire and pay off the outstanding receipts for payments on new stock of the company, which stock was authorized to be retired by vote of the stockholders at the August meeting, 1867, and the said bonds are not to be sold or negotiated in exchange for receipts at less than par for said bonds."

That such bonds were never tendered to or demanded by the plaintiff; that plaintiff has demanded repayment of the money so paid by him on said subscription for said new stock, and that defendant wholly refuses to make such payment.

Wherefore plaintiff demands judgment against the defendant for thirteen thousand nine hundred and eighty dollars, with interest from February 20th, 1866, together with the costs of this suit.

STARR & RUGGLES,
*Pl'ff's Att'ys.*

CITY AND COUNTY OF NEW YORK, *ss:*

13, 14 Dexter A. Knowlton, being duly affirmed, says he is the plaintiff in this action, and that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes the same to be true.

D. A. KNOWLTON.

Affirmed to before me this 29th day of November, 1869.

DUENA L. HUBBARD,
*Notary Public, 10 Wall street, New York.*

15 *Answer.*

Supreme court.

DEXTER A. KNOWLTON
*agst.*
THE CONGRESS & EMPIRE SPRING COMPANY.

The above-named defendant, The Congress & Empire Spring Company, by Charles S. Lester, its attorney, for an amended answer to the amended complaint in this action, states:

That the above-named plaintiff was one of the original corporators of the Congress & Empire Spring Company and a large stockholder therein, and has ever since continued, and still is, a stockholder in said company.

That from August, 1865, to August, 1866, the said plaintiff was one of the trustees and vice-president of said company. That the said plaintiff devised and counselled the plan of increasing the capital stock of said corporation set forth in the amended complaint. That said plaintiff prepared and offered the various resolutions in reference
16 thereto set forth in the said amended complaint, and the defendant denies that a meeting of the stockholders was called pursuant to the resolution of the directors set forth in the amended complaint, but states that the said defendant, for the purpose of increasing its capital stock, and in compliance with the provisions of an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17th, 1848, and the various acts amending the same, caused a notice, signed by a majority of the trustees of said corporation, specifying the objects of the meeting, the time and place when and where such meeting should be held, and the amount to which it was proposed to increase the capital, and the business to which the company would be extended, to be published in a newspaper in the county of Saratoga at least three successive weeks previous to the day fixed for holding such meeting, which said notice was as follows:

"Notice is hereby given that a meeting of the stockholders of
17 the Congress and Empire Spring Co. will be held at their office, in Saratoga Springs, on Thursday morning, February 8th, at 10 o'clock, to vote for increasing the capital stock of the company two hundred thousand dollars, for the purpose of building a glass factory for making bottles for bottling the waters of the Congress, Empire, and Columbian Springs, and for creating a working capital for the company.

"January, 11th, 1866.

"CHAUNCEY KILMER,
"D. A. KNOWLTON,
"ISAAC FRINK,
"C. SHEEHAN,
"L. E. WHITING,
"*Trustees.*

"W. R. JOHNSON, *Sec'y.*"

And defendant also caused to be deposited a printed copy of said notice in the post-office, addressed to each stockholder at his usual place of residence, at least three weeks previous to the day fixed upon for holding such meeting, and in all things complied with the conditions and provisions of said statute in reference to calling a meeting
of stockholders for the purpose of increasing the capital stock
18 of said corporation. That at the time and place specified in said notice, to wit, the eighth day of February, 1866, at the office of said corporation in Saratoga Springs, stockholders representing more than two thirds of all the shares of stock of said corporation appeared in person or by proxy, and duly organized in the manner provided by law, and proceeded to a vote of those present in person and by proxy, and by a vote of more than two-thirds of all the shares of stock of said corporation voted to increase the capital stock of said corporation two hundred thousand dollars. That a certificate of such proceedings in the form and manner provided by the said statute was duly made,

signed, and filed, and all the provisions of said act were fully complied with, and thereby the capital stock of said corporation was duly increased two hundred thousand dollars.

Defendant further states that said plaintiff prepared the subscription agreement set forth in the amended complaint, and signed the
19 same and advised and urged other members of said corporation to join in the same. That said plaintiff also prepared the form of the receipt set forth in the amended complaint, and under his direction the secretary executed and delivered to said plaintiff the receipt set forth in the amended complaint. That Cornelius Sheehan subscribed said agreement for seven hundred shares of said new stock and not otherwise.

That said Sheehan was then the holder of other original stock of said company on which an illegal, unauthorized, and fictitious dividend had been declared, payable on the 20th day of February, 1866, at the same time and place as the first call of twenty per cent. on the said new stock was made payable. That the said dividend upon the amount of original stock held by said Sheehan amounted to the sum of thirteen thousand nine hundred and eighty-eight dollars, and said twenty per cent. call amounted on said new stock so subscribed for by said Sheehan to thirteen thousand nine hundred and eighty dollars. That on the 20th day of February, 1866, the said Sheehan gave a receipt for said divi-
20 dend to the amount of thirteen thousand nine hundred and eighty dollars, and the same was applied upon the said call.

That no money was paid by said Sheehan upon said call, nor did he or the plaintiff pay to this defendant any sum of money on or towards said new stock in any form, but the said receipt was so as aforesaid given to plaintiff, under his direction, in acknowledgement of the supposed payment so as aforesaid made by said Sheehan and for no other purpose and on no other consideration. That the aforesaid dividend was unauthorized and unlawfully declared; that at the time it was declared and made payable the company had no money, funds, earnings, or securities for the payment thereof; and then was largely indebted upon obligations then due in excess of its available means of payment; that there were no surplus profits arising from the business of said company with which to make such dividend; that said dividend was declared upon an arrangement among the officers of the company that it
21 should be applied upon the payment of said twenty per cent. call, and was not declared in good faith, and was fraudulent and contrary to law.

That subsequent calls for payment of installments upon the stock so as aforesaid subscribed for were duly made by the trustees of the said company, and a personal demand therefor was duly made upon the said Sheehan and the said plaintiff more than sixty days before the 25th day of January, 1867, and the said plaintiff and the said Sheehan neglected and refused to make payment thereon in pursuance of said calls and demands; whereupon the trustees of defendant proceeded to forfeit the payment made upon said stock and the interest of said plaintiff and said Sheehan in said stock in the manner provided by law and the charter and by-laws of said corporation and in pursuance of the subscription agreement set forth in the complaint as they lawfully might.

Second. And for a further and separate defence to said complaint defendants state that the various resolutions and agreements set
22 forth in the complaint were prepared by the plaintiff, and the passage and adoption of the same urged by him and others for the purpose of enabling him and them to obtain and procure a large

number of shares of stock to be issued to him and them by the company against the wishes and in fraud of the rights of some of the stockholders and in violation of his duty as a trustee of said company and in fraud of the rights of those stockholders who held and owned full-paid stocks, and for the purpose of putting the stock so as aforesaid to be fraudulently procured by him upon the market as full-paid stock, and to deceive and defraud the public by fictitious sales and by pretending that such stock was of great value, by such means and to sell the same at a price much beyond its true value to persons unacquainted with the fraudulent and evil practices by which it had been issued and inflated, and that the said plaintiff paid in the money stated in the complaint voluntarily for the purpose and with the intent of carrying out
23, 24 his unlawful and fraudulent plans and designs.

Wherefore the defendants demand that the complaint in this action be dismissed with costs.

CHARLES S. LESTER,
*Def'ts Att'y.*

SARATOGA COUNTY, *ss:*

Cornelius Sheehan, being duly sworn, saith that he is one of the trustees of the Congress and Empire Spring Co., and has been since its organization; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

C. SHEEHAN.

Sworn to before me February 7, 1870.

J. S. LEAKE,
*Notary Public.*

25 Supreme court.

DEXTER A. KNOWLTON, *agt.* THE CONGRESS AND EMPIRE SPRING COMPANY.

SARATOGA COUNTY, *ss:*

Charles S. Lester, of Saratoga Springs, in said county, being duly sworn, saith that he is the attorney for the defendants in the above entitled action; that a motion to change the place of trial of this action was noticed to be made on the 17th day of April, 1875, which motion, at the request of the plaintiff's attorney, and for their convenience, was delayed until April 24, 1875; that, on that day and at the time deponent was prepared and ready to make such motion, the plaintiff's attorneys caused to be served upon the deponent copies of a petition and bond by which they claimed to remove the cause to the United States circuit court; that the said court have decided that such proceedings were illegal and ineffectual to transfer this cause; that upon the service
26 of such papers, plaintiff's attorneys claimed the motion to change the place of trial could not be made, and the said motion was thereupon waived by deponent.

CHARLES S. LESTER.

Sworn before me Nov. 4, 1875.

CHARLES C. LESTER,
*Notary Public.*

27, 28 Supreme court.

DEXTER A. KNOWLTON, *agt.*
THE CONGRESS AND EMPIRE SPRING COMPANY.

Take notice that, upon an affidavit, with a copy of which you are herewith served, and upon the affidavits heretofore served, and upon the pleadings, proceedings, and other papers in this action, a motion will be made at the next special term of this court to be held at the court house in the city of Newbergh, on the third Monday of November, 1875, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order changing the place of trial of this action from the county of Kings to the county of Saratoga, and for such other rule or order as the nature of the case may require.

Dated Saratoga Springs, Nov. 4, 1875.

Yours, &c.,

CHARLES F. LESTER,
*Def't's Atty.*

To STARR & RUGGLES,
*Plffs. Attys.*

29 At a special term of the supreme court held in and for the State of New York, at the court house in the city of Newbergh, on the 15 day of November, 1875.

Present, Hon. Joseph F. Barnard, Justice.

DEXTER A. KNOWLTON, *agt.*
THE CONGRESS AND EMPIRE SPRING COMPANY.

On reading and filing the affidavits of Cornelius Sheehan and Charles S. Lester and the pleadings, orders, and judgment in this action, and notice of motion to change the place of trial of this action, and after hearing Charles S. Lester, attorney for the defendant, in support of said motion, and after hearing counsel for plaintiff in opposition to said motion, it is ordered that the place of trial of this action be and the same is hereby changed from the county of Kings to the county of Saratoga, with ten dollars costs of this motion to abide the event of this suit.

30 Enter in Kings County.

T. F. BARNARD.

Copy.

GEO. G. HEEMAN, *Clk.*

31 At a special term of the supreme court held at the court house in the county of New York on the 11th day of December, 1876.

Present, Hon. John R. Brady, Justice.

DEXTER A. KNOWLTON *agt.*
THE CONGRESS AND EMPIRE SPRING COMPANY.

It being suggested to the court that, pending this action, the plaint-

iff, Dexter A. Knowlton, has died, and that Dexter A. Knowlton, jr., and Charles D. Knowlton, of Freeport, Illinois, have been duly appointed administrators of the goods, chattels, and credits which were of the said Dexter A. Knowlton, deceased, and the attorney for the defendant having consented thereto, it is ordered that this action be and the same is hereby revived and continued by and in the name of the said Dexter A. Knowlton, jr. and Charles D. Knowlton, as administra-
32 tors, &c., of the said Dexter A. Knowlton, deceased, as plaintiffs, without prejudice to the proceedings heretofore had therein.

JNO. R. BRADY.

(Endorsed:) Filed and ent'd Dec. 13, 1876. J. S. C.

A copy.

JAMES W. HORTON,
*Clerk of Saratoga Co., N. Y.*

33 Supreme court of the State of New York.

DEXTER A. KNOWLTON, JR., AND CHARLES D. Knowlton, administrators of the goods, chattels, and credits which were of Dexter A. Knowlton, deceased,
*agt.*
THE CONGRESS AND EMPIRE SPRING COMPANY.

To the honorable the supreme court of the State of New York:

The petition of Dexter A. Knowlton, jr., and Charles D. Knowlton, administrators of the goods, chattels, and credits which were of Dexter A. Knowlton, deceased, respectfully shows that your petitioners are the plaintiffs in the above-entitled suit; that the same was commenced by the said Dexter A. Knowlton in his lifetime, and on or about the 17th day of September, 1869, against the said Congress and Empire Spring Company, in the supreme court of the State of New York; that
34 in or about the month of March, 1876, the said Dexter A. Knowlton died, and the said suit has been revived and continued in the names of your petitioners, as administrators, &c., by an order of this court, duly made on or about the 11th day of December, 1876.

And your petitioners further show that the said Dexter A. Knowlton was at the time of his decease, and for several years prior thereto had been, a citizen of the State of Illinois, and that your petitioners are, and each of them is, a citizen of said State of Illinois, residing at Freeport, in said State, and have been residents and citizens of said State for more than three years last past, and that the defendant in said suit was, prior to the commencement thereof, and now is a corporation created, organized, and existing under the laws of the State of New York, and was and is a citizen of said State.

And your petitioners further show that this suit was begun by the said Dexter A. Knowlton, as plaintiff, to recover of said defend-
35 ant, the Congress and Empire Spring Company, the sum of thirteen thousand nine hundred and eighty dollars, with interest thereon from February 20th, 1866, which sum is claimed and judgment demanded therefor in the complaint of the plaintiff; that the answer of the defendant denies the said claim and the cause of action in said complaint averred and set forth, and the said sum of $13,980 and interest,

which is the amount in dispute in this suit, exceeds, exclusive of costs, the sum or value of five hundred dollars.

And your petitioners further show that this suit is pending for trial in said supreme court in the county of Saratoga, in said State, and has not been tried, and that they are desirous of removing it before the trial thereof into the next circuit court of the United States to be held in the northern district of New York, pursuant to the statutes of the United States in such case made and provided, and have made to be filed herewith the affidavit required by subdivision third of section 639 of the Revised Statutes of the United States.

36 And your petitioners further represent that they are ready and willing to give good and sufficient surety for entering in said circuit court on the first day of its session copies of all process, pleadings, depositions, testimony, and all other proceedings in the cause concerning or affecting them, and for doing any and everything required by the statute in such case made and provided, and offer herewith to be filed a bond with good and sufficient surety in the penal sum of one thousand dollars, conditioned for their so doing as aforesaid.

And your petitioners therefore pray that said surety may be accepted and that said suit may be removed into the next circuit court of the United States for the northern district of New York in the second circuit, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioners will ever pray, &c.

D. A. KNOWLTON, JR.
CHAS. D. KNOWLTON.

37 STATE OF ILLINOIS,
*County of Stephenson, ss:*

Dexter A. Knowlton, jr., and Charles D. Knowlton, being severally duly sworn, do depose and say that they are the above-named petitioners and have read the foregoing petition and know the contents thereof, and that the same is true of their own knowledge, except as to the matters therein stated on information and belief, and as to those matters they believe it to be true; and the said Dexter A. Knowlton, jr., further saith that his residence is Freeport, in the State of Illinois, his age is 33 years, and his occupation is banker, and the said Charles D. Knowlton saith that his residence is Freeport, in said State of Illinois, his age is 28 years, and his occupation is banker.

D. A. KNOWLTON, JR.
CHAS. D. KNOWLTON.

Subscribed and sworn before me this 18th day of December, A. D. 1876.

[NOTARIAL SEAL.] HENRY M. BARNUM,
*Notary Public Stephenson County, Illinois.*

38 STATE OF ILLINOIS,
*Stephenson County, ss:*

I, J. F. Kleckner, clerk of the county court in and for the county of Stephenson, do hereby certify that Henry M. Barnum, the officer before whom the affidavit to the foregoing and within petition was taken, was at the time of taking such affidavit a notary public residing in said county duly authorized to take the same; that I am well acquainted with his handwriting and verily believe that the signature to said jurat is genuine, and such affidavit purports to be taken in all respects as required by the laws of the State of Illinois.

And I further certify that I am authorized by such laws to make this certificate.

Witness my hand and official seal this 18th day of December, A. D. 1876.

[SEAL OF THE COUNTY COURT OF STEPHENSON CO.] J. F. KLECKNER, *Clerk.*

Filed Jan'y 27, 1877.

JAMES W. HORTON, *Clerk.*

39 Supreme court of the State of New York.

DEXTER A. KNOWLTON, JR., AND CHARLES D. Knowlton, administrators of the goods, chattels and credits which were of Dexter A. Knowlton, deceased,

*agt.*

THE CONGRESS AND EMPIRE SPRING COMPANY.

STATE OF ILLINOIS,

*County of Stephenson, ss:*

Dexter A. Knowlton, jr., residing at Freeport, in said State, 33 years of age, by occupation a banker, and Charles D. Knowlton, residing at Freeport aforesaid, 28 years of age, by occupation a banker, being duly sworn, do depose and say, that they are citizens of the State of Illinois, residing at Freeport, in said State, and are the plaintiffs in the above-entitled suit, as administrators, &c., of Dexter A. Knowlton, deceased, who at the time of his decease resided at Freeport aforesaid, and was a citizen of said State of Illinois; that said suit or action was brought
40 in the supreme court of the State of New York, on or about the 17th day of September, 1869, and is now pending in said court.

And deponents further say that they have reason to believe, and do believe, that from prejudice or local influence they will not be able to obtain justice in said court.

And further say not.

D. A. KNOWLTON, JR.
CHAS. D. KNOWLTON.

Subscribed and sworn to before me, this 18th day of December, A. D. 1876.

HENRY M. BARNUM,
*Notary Public for Stephenson County, Illinois.*

STATE OF ILLINOIS,

*County of Stephenson, ss:*

I, J. F. Kleckner, clerk of the county court in and for said Stephenson county, do hereby certify that Henry M. Barnum, the officer before whom the foregoing affidavit was taken, was, at the time of taking such affidavit, a notary public residing in said county, and duly authorized to take the same; that I am well acquainted with his handwriting,
41 and verily believe that the signature to said jurat is genuine, and such affidavit purports to be taken, in all respects, as required by the laws of the State of Illinois; and

I further certify that I am authorized by such laws to make this certificate.

Witness my hand and official seal this 18th day of December, A. D. 1876.

J. F. KLECKNER, *Clerk.*

SEAL OF COUNTY COURT STEPHENSON CO.

Saratoga special term.

Presented in open court, Jan'y 25, 1877.

A. BOCKES,
*Justice Sup. Court.*

Filed Jan'y 25, 1877.

JAMES W. HORTON, *Clerk.*

42 Know all men by these presents, that we, Dexter A. Knowlton, jr., and Carles D. Knowlton, of Freeport, in the State of Illinois, administrators of all and singular the goods, chattels, and credits which were of Dexter A. Knowlton, deceased, as principals, and Charles W. Russell, of the city of Brooklyn, State of New York, as surety, are jointly and severally firmly held and bounden unto the Congress and Empire Spring Company, the defendant in the suit herein-below mentioned, its successors and assigns, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said the Congress and Empire Spring Company, its successors or assigns, for which payment well and truly to be made we jointly and severally bind ourselves and our respective successors, heirs, executors, and administrators forever by these presents. Sealed with our seals this eighteenth day of December, in the year one thousand eight hun-
43 dred and seventy-six.

Whereas the said Dexter A. Knowlton, above named, in his lifetime, began a suit in the supreme court of the State of New York, as plaintiff, against the above named The Congress and E npire Spring Company, defendants;

And whereas the said suit has been revived and continued in the name of the said Dexter A. Knowlton, jr., and Charles D. Knowlton, administrators, &c., as plaintiffs, and is now pending in the said court;

And whereas the said plaintiffs have made their petition to the said supreme court to be filed herewith in such suit for the removal of the said suit into the next circuit court of the United States, to be held in and for the northern district of New York in the second circuit:

Now, therefore, the condition of this obligation is such that, if the said Dexter A. Knowlton, jr., and Charles D. Knowlton, administrators, &c., as plaintiffs, shall enter in such circuit court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and
44 other proceedings in said cause affecting or concerning the petitioners, then this obligation shall be void, otherwise shall remain in full force.

In witness whereof, said parties have hereunto set their hands and seals the eighteenth day of December, A. D. 1876.

D. A. KNOWLTON, JR. [L. S.]
CHAS. D. KNOWLTON. [L. S.]
CHARLES W. RUSSELL. [L. S.]

STATE OF ILLINOIS,
*County of Stephenson, ss:*

On this 18th day of December, in the year 1876, before me personally came Dexter A. Knowlton, jr., and Charles D. Knowlton, to me known to be the individuals described in and who executed the above instrument, and severally acknowledged that they executed the same for the purposes therein mentioned.

[NOTARIAL SEAL.]

HENRY M. BARNUM,
*Notary Public, Stephenson County, Illinois.*

45 STATE OF ILLINOIS,
*County of Stephenson, ss:*

I, J. F. Kleckner, clerk of the county court in and for said Stephenson County, do hereby certify that Henry M. Barnum, who subscribed the foregoing certificate of acknowledgement, was at the time of taking such acknowledgement a notary public residing in said county, and duly authorized to take and certify the same by the laws of said State, and that the same is taken and certified in all respects as required by the laws of said State. That I am well acquainted with the handwriting of said Henry M. Barnum, and verily believe that the signature attached to the foregoing certificate is the genuine signature of said Henry M. Barnum.

Witness my hand and official seal this 18th day of December, A. D. 1876.

( SEAL OF STEPHENSON ) J. F. FLECKNER,
( COUNTY COURT. ) *Clerk.*

STATE OF NEW YORK,
*City & County of New York, ss:*

On this 23rd day of December, A. D. 1876, personally appeared
46 before me Charles W. Russell, to me known, and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same for the purposes therein mentioned.

[NOTARIAL SEAL.] GEORGE W. BROWELL,
*Notary Public, N. Y. Co.*

STATE OF NEW YORK,
*City & County of New York, ss:*

Charles W. Russell, being duly sworn, says that he is a resident of the State of New York and a freeholder therein, and is worth the sum of one thousand dollars over and above all his debts and liabilities and exclusive of property exempt by law from execution.

CHARLES W. RUSSELL.

Subscribed and sworn to before me this twenty-third day of December, A. D. 1876.

[NOTARIAL SEAL.] GEORGE W. BROWELL,
*Notary Public, N. Y. County.*

Saratoga special term, Jan'y 25, 1877.

Presented in open court & approved by me,

A. BOCHES,
*Justice of Sup. Court.*

Filed Jan'y 27, 1877.

JAMES W. HORTON,
*Clerk.*

47 STATE OF NEW YORK,
*Saratoga County Clerk's Office, ss:*

I, James W. Horton, clerk of the said county of Saratoga, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding copy with the original petition, affidavits, & bond, with the endorsements thereon in my office, and that the same is a correct transcript therefrom, and of the whole of said original.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 10th day of March, 1877.

[L. S.] JAMES W. HORTON, *Clerk.*

48 (Indorsed:) Supreme court. Dexter A. Knowlton, jr., & an as adm's, &c., ag'st The Congress & Empire Spring Company. Cert'd copies, petition, affidavits, & bond for removal of cause to U. S. circuit court; also process, pleadings, &c., &c., being a copy of the record. Starr & Ruggles, attorneys for pl'ffs, 120 Broadway, New York. Filed March 20, 1877.

49, 50 At an adjourned term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city of Utica on Tuesday the 20th day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Alexander S. Johnson, circuit judge.

DEXTER A. KNOWLTON, JR., AND CHARLES D. Knowlton, as administrators of the goods, chattels, & credits which were of Dexter A. Knowlton, deceased,
*ag'st*
THE CONGRESS & EMPIRE SPRING COMpany.

On reading and filing certified copies of papers for the removal of this cause from and out of the supreme court of the State of New York, Saratoga County, into this court, and on motion of Starr & Ruggles, ordered that said cause be and the same is entered in this court, and that the appearance of the said plaintiffs by Starr & Ruggles, as their attorneys, be and the same is hereby entered in this court.

51 United States circuit court, northern district of New York.

DEXTER A. KNOWLTON, JR., AND ANOTHER administrator, &c.,
*vs.*
THE CONGRESS & EMPIRE SPRING COMPANY.

It is hereby stipulated by and between the attorneys for the respective parties, that the above entitled case may be tried and determined by the court, without the intervention of a jury, and a jury is hereby waived.

STARR & RUGGLES,
*Pl'ff's Att'ys.*
CHARLES S. LESTER,
*Def'ts Att'y.*

52 Filed Oct. 10, 1877.

53, 54 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit court, held at the city hall in the city of Albany, on Wednesday the 10th day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable William J. Wallace, judge.

DEXTER A. KNOWLTON, JR., & ANOTHER, administrators, &c.,
*vs.*
THE CONGRESS AND EMPIRE SPRING COMpany.

On filing stipulation signed by the attorneys for the respective parties,

ordered that the above-entitled case be tried and determined by the court without the intervention of a jury.

Mr. Ruggles opens case for plff.

Mr. Lester argues case for deft.

Mr. Ruggles concludes argument for plff.

Papers submitted & decision reserved.

55 United States circuit court northern district of New York.

DEXTER A. KNOWLTON, JR., AND CHARLES D. Knowlton, as administrators, &c., of Dexter A. Knowlton, deceased, plaintiffs,
*vs.*
THE CONGRESS AND EMPIRE SPRING COMPANY, defendant.

The issues of fact in this cause coming on to be tried and determined by the court without the intervention of a jury pursuant to the stipulation in writing waiving a jury heretofore filed with the clerk by the attorneys of record of the parties hereto, at this October term in the year 1877, and the same having been tried at the said term held by the honorable William J. Wallace, one of the judges of this court at the city of Albany.

The court now here finds and determines the facts in this cause to be as follows:

That the defendant, the Congress and Empire Spring Company,
56 is a corporation duly organized under the act of the legislature of the State of New York, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17, 1848, as extended in its operation and effect by an act of said legislature passed March 31st, 1863; and was made subject to all the provisions, duties, and obligations contained in the said act of February 17, 1848, above mentioned and became entitled to all the benefits and privileges thereby conferred.

That the capital stock of the said corporation, as originally fixed and limited, was one million of dollars divided into ten thousand shares of the par value of one hundred dollars each, and was issued in payment for property purchased by the trustees of said corporation, and thereby became full stock and not liable to any further calls.

That the defendant being desirous of increasing its capital stock by the addition of two hundred thousand dollars thereto, resolutions were passed at a meeting of the board of trustees thereof, on the 11th day of January, 1866, as follows:

57 "Resolved, That the capital stock of the Congress and Empire Spring Company be increased two hundred thousand dollars for the purpose of building a glass factory for making bottles for bottling the water of the Congress, Empire, and Columbian Springs and creating a working capital.

"That the books of the company be opened for subscriptions to said stock, and that each stockholder be allowed to take one share of said new stock for every five shares he now holds, and that when he pays eighty dollars on each share, the company will issue to him a certificate as if for full-paid stock."

That a meeting of the board of trustees was held on the 8th day of February, 1866, at which resolutions were passed as follows:

"Resolved, That a dividend of four per cent. be paid at the office of the company on the twentieth of February.

"Resolved, That a call of twenty per cent. on the new stock be made to be paid at the office of the company on the 20th of February, 1866; that the books of the company be opened at once for subscriptions to that stock, and that each stockholder have the privilege of taking one share of the new stock for every five shares they hold of the old,
58 provided they take said new stock and pay to the company $20 on each share on or before February 20th, 1866; and if any stockholder fails to pay the company twenty dollars on each share of the new stock they are entitled to on or before February 20th, 1866, they shall forfeit all claim to said new stock.

"Resolved, That provided there is on the 21st day of February, 1866, any of the 200,000 of new stock to be issued by this company that the stockholder who was entitled to it has failed to pay into the company $20 on each share, it shall be equally divided among the stockholders in proportion to the amount of stock held by them who have paid into the company $20 on the proportion they were entitled to, and that the secretary shall at once advise each stockholder who is entitled to one share or more of said stock the number of shares they are entitled to, and provided they pay to the company $20 on each share on or before March 1st, 1866, the company shall issue the stock to said stockholder, and if they fail to pay $20 to the company on each of said shares allotted to them, then the president and secretary shall let any stockholder
59 have said stock who will take it and pay $20 on each share, and if there is more of said stock applied for than there is left to be taken within three days after the first of March, it shall be divided by the president and secretary between those applying in proportion to the amount of stock held by them.

That pursuant to the last above resolution a subscription agreement was issued by the trustees of said company in the words and figures following, to wit:

"CONGRESS AND EMPIRE SPRING CO.

"*Stock subscription.*

"We, the undersigned, hereby covenant and agree to take the number of shares of the capital stock of the Congress and Empire Spring Company set opposite our names, respectively, and pay the company for each share eighty dollars, in installments as called for by the directors of said company, and if we fail to pay as called for by the directors for sixty days after the time it is called for, we agree to forfeit to the company all sums that we have paid on said stock. The Congress
60 and Empire Spring Company agree and bind themselves to pay interest on all sums paid on said stock to the holder from the day it is paid up to February 1st, 1867; and on the 8th day of February, 1867, for all of said stock that eighty dollars has been paid on each share they agree to issue a certificate to the holder for full-paid stock, when the stock shall draw dividends, and be treated the same as other full-paid stock, provided there is any of said stock that there has not been $80 paid to the company on each share February 1st, 1867, and said stock has not been forfeited to the company, the company shall be bound to pay only the interest on the sums paid on said stock until the first dividend has been declared after $80 has been paid on each share. Said company also agree that the holders of said stock shall be entitled

to vote at all times, the same as on full-paid stock, provided all calls due have been paid.

"SARATOGA SPRINGS, *Feb. 8th*, 1866."

That said agreement was signed by C. Sheehan, among others,
61 as a subscriber for six hundred and ninety-nine shares of the said new stock; and the subscriptions embraced all or nearly all of the new stock.

That an agreement was made between the plaintiff's intestate and the said Sheehan, whereby it was agreed that the said Sheehan would lend the plaintiff's intestate his dividend on his old stock for one year, and that the plaintiff's intestate would take the new stock subscribed for by the said Sheehan as aforesaid, and relieve him from further calls. That the plaintiff's intestate made his note to the said Sheehan for $13,980, dated February 20, 1866, payable one year from date, which the plaintiff's intestate caused to be delivered to him, with 150 shares of stock as collateral security to the note in the purchase and payment for, to that amount, of the said dividend of the said Sheehan, and the said Sheehan received the said note with the said collateral security in payment for so much of said dividend on a sale thereof by him to the plaintiff's intestate.

The whole amount of the dividend to the said Sheehan was
62 $13,988, being on 3,497 shares of old stock.

The sum of eight dollars thereof was paid by the defendant in cash to the said Sheehan.

That on or about the 8th of March, 1866, the plaintiff's intestate paid to the defendant the call of twenty per cent. on the said new stock so subscribed for by the said Sheehan, by the application thereon by the said defendant, at the request of the plaintiff's intestate, of $13,980 of the said dividend to the said Sheehan so as aforesaid to that amount purchased by the plaintiff's intestate, and thereupon the defendant gave to the plaintiff's intestate a receipt of its secretary, with a two-cent internal revenue stamp affixed thereto, of which the following is a copy:

'$13,980.] "OFFICE OF THE CONGRESS AND
"EMPIRE SPRING COMPANY,
"*Saratoga Springs, February 20th*, 1866.

"Received of D. A. Knowlton, esq., thirteen thousand nine hundred and eighty dollars, it being the first installment of twenty per
63 cent. on 699 shares of stock standing in the name of D. A. Knowlton on the books of the Congress and Empire Spring Co., and said company agrees to pay interest on said $13,980 from this date up to Feb. 1st, 1867, provided the amount now left unpaid on said stock is paid when called for by the directors of the company.

"W. R. JOHNSON, *Sec'y.*"

[Internal-revenue stamp, 2 cents, cancelled.]

That the said note given by the plaintiff's intestate to the said Sheehan, as aforesaid, was paid and satisfied by the plaintiff's intestate to the said Sheehan, in or about the month of December, 1868, before maturity, as follows: $7,500 in $15,000 of stock of the said company at fifty cents on the dollar, and the balance in cash and checks.

That calls subsequent to the aforesaid calls thereon of twenty per cent. for payment of installment upon the stock so as aforesaid subscribed for by the said Sheehan were duly made by the trustees of the said company, and a personal demand therefor was duly made
64 upon the said Sheehan and the said plaintiff's intestate more

than sixty days before the 25th day of January, 1867, and the plaintiff's intestate and the said Sheehan neglected and refused to make payment thereon, in pursuance of said calls and demands, whereupon the trustees of the defendant proceeded to forfeit the payment upon said stock, and the interest of the plaintiff's intestate and said Sheehan in said stock, by passing the resolution in that behalf in substance set forth in the complaint, as follows:

"Resolved, That the 712 shares of new stock, viz, 699 shares subscribed by C. Sheehan, and standing in the name of D. A. Knowlton, &c., &c., &c., on which calls have been made, and remained delinquent for over sixty days, are hereby declared forfeited to the company in accordance with the terms of subscription."

That from August, 1865, to August, 1866, the plaintiff's intestate was a trustee and the vice-president of said company; that he actively
65 participated by advice and counsel in the proceedings for increasing the capital stock of the said company, and prepared and offered the resolutions in relation thereto set forth in the complaint; that he presented and moved the adoption of the said resolution for a dividend, and prepared the said subscription agreement and signed and advised signatures thereto, and prepared the form of the receipt.

That a meeting of the stockholders of the defendant was held on the 7th of August, 1867, at which a resolution was passed, as follows:

"Resolved, That the capital stock of this company be reduced to the original capital of $1,000,000, and that the trustees of the company be and hereby are authorized to adjust with the owners or holders of the two thousand shares heretofore increased, or intended to be added to the capital stock or any part thereof, or with their assigns, for retiring said stock so authorized to be increased, on such terms and conditions as the said directors shall deem for the interest of the company."

66 That a meeting of the board of trustees of the said company was held on the same day, at which a resolution was adopted, as follows:

"Resolved, That the authority this day conferred upon this board by the stockholders of this company, in regard to the retiring and cancelling of the stock of this company down to the sum of $1,000,000, is hereby conferred upon the executive committee, and said committee are hereby authorized to adjust the claims of all persons holding receipts for payments on the new stock of the company, on such terms, as to price and payment, as shall be deemed by said committee for the best interest of the company."

That the said executive committee, on the 27th day of March, 1868, adopted a resolution, as follows:

"Resolved, That the Congress and Empire Spring Company issue five-years coupon bonds of the form adopted at prior meeting, in sufficient amount to retire and pay off the outstanding receipts for
67 payments on new stock of the company, which stock was authorized to be retired by vote of the stockholders at the August meeting, 1867, and the said bonds are not to be sold or negotiated in exchange for receipts at less than par for said bonds."

That such bonds were never tendered to or demanded by the plaintiff's intestate; that the plaintiff's intestate demanded repayment of the money so paid by him on said subscription for said new stock, and that defendant wholly refused to make such repayment.

That most of the old stockholders became subscribers for the new stock, and that all the subscribers for the new stock, other than the said Sheehan, and the plaintiff's intestate as to the subscription of the

said Sheehan, and one or two subscribers for small amounts paid the calls upon them in respect to said new stock; that the said first call of twenty per cent. was paid mostly by the said dividend, but about $3,000 was paid in cash; that all the stockholders who did not subscribe for said new stock were paid their portions of said dividend in cash;
68 that about $86,500 of bonds were issued by the company to retire the said new stock; that about $18,500 thereof have been paid, and about $68,000 are outstanding; that $2,600 in addition has been paid in cash to retire said new stock.

That the said Dexter A. Knowlton, having commenced this action, died during the pendency thereof; and that the plaintiffs, as his administrators, have succeeded to his interest therein.

And, as a conclusion of law, the court finds that the plaintiffs are entitled to a judgment against the defendant for the sum of $13,980, with interest from February 20th, 1866, making a total amount of twenty-five thousand six hundred and eighty-seven dollars and eighty-five cents, with the costs of this action.

February 6, 1878.

WM. J. WALLACE.

69, 70 (Indorsed:) United States circuit court, northern district of New York. Dexter A. Knowlton, jr., & others vs. The Congress & Empire Spring Company. Decision. Filed Feb. 11, 1878.

71 United States circuit court, northern district of New York.

DEXTER A. KNOWLTON, JR., AND CHARLES D. KNOWLTON, as administrators, &c., of Dexter A. Knowlton, deceased, plaintiffs,
*vs.*
THE CONGRESS AND EMPIRE SPRING COMPANY, defendant.

This action, and the issues of fact therein, coming on to be tried at this term of October, in the year 1877, at the city of Albany, in the northern district of New York, before the honorable William J. Wallace, one of the judges of this court, without a jury, pursuant to the stipulation in writing waiving a jury heretofore filed herein.

And the court having on the 6th day of February, 1878, made its decision and finding upon the facts, and ordered judgment for the plaintiffs for the sum of twenty-five thousand six hundred and eighty-seven $\frac{85}{100}$ dollars, with the costs of this action.

72 Therefore, it is considered that Dexter A. Knowlton, jr, and Charles D. Knowlton, as administrators, &c., of Dexter A. Knowlton, deceased, the plaintiffs, do recover against the Congress and Empire Spring Company, the defendant, the sum aforesaid, and interest thereon, amounting to twenty-five thousand seven hundred and eighty-seven $\frac{73}{100}$ dollars, their damages, and also the further sum of one thousand seven hundred and sixteen $\frac{13}{100}$ dollars for their costs and charges by the court now here adjudged of increase to the said plaintiffs, which damages and costs and charges amount in the whole to the sum of twenty-seven thousand five hundred and three dollars and eighty-six cents.

And the said defendant in mercy, &c.

Judgment signed this 25th day of February, A. D. 1878.

CHARLES MASON, *Clerk.*

73, 74 (Indorsed:) U. S. circuit court, north. dist. of N. Y. Dexter A. Knowlton, jr., and Charles D. Knowlton, as administrators, &c., of Dexter A. Knowlton, deceased, vs. The Congress & Empire Spring Company. Copy. Judgment record. Starr & Ruggles, pl'ff's attorneys. Damages, $25,787.73; costs, 1,716.13—$27,503.86. Filed February 25, 1878, 5 o'clock p. m.

75 In the circuit court of the United States for the northern district of New York.

DEXTER A. KNOWLTON ET AL., EX'RS, &C., OF Dexter A. Knowlton, dec'd, *agt.* THE CONGRESS AND EMPIRE SPRING COMPANY.

The pleadings herein are made a part hereof.

Afterwards, to wit, at a term of said court held at the United States court room in the city of Albany, in and for said district, on the 9th day of October, 1877, before the Hon. William J. Wallace, judge of said court, a jury having been waived by the written stipulation of the parties, duly filed, the aforesaid issues so joined between the said parties as aforesaid, came on to be tried, at which day came as well the said plaintiffs as the said defendant, by their attorneys aforesaid. The plaintiffs, in order to maintain the issues upon their part, read the complaint and answer and rested their case.

The defendant offered evidence tending to prove the defences set up in the answer, and from said pleadings and proofs the court

76 now here finds and determines the facts in this case as follows:

That the defendant, the Congress and Empire Spring Company, is a corporation duly organized under the act of the legislature of the State of New York, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17th, 1848, as extended in its operation and effect by an act of said legislature passed March 31st, 1863; and was made subject to all the provisions, duties, and obligations contained in the said act of February 17th, 1848, above mentioned, and became entitled to all the benefits and privileges thereby conferred.

That the capital stock of said corporation, as originally fixed and limited, was one million of dollars, divided into ten thousand shares, of the par value of one hundred dollars each, and was issued in payment for property purchased by the trustees of said corporation, and thereby became full stock, and not liable to any further calls.

That the defendant being desirous of increasing its capital stock

77 by the addition of two hundred thousand dollars thereto, resolutions were passed at a meeting of the board of trustees thereof, on the 11th day of January, 1866, as follows;

Resolved, That the capital stock of the Congress and Empire Spring Company be increased two hundred thousand dollars, for the purpose of building a glass factory for making bottles for bottling the water of the Congress, Empire, and Columbian Springs, and creating a working capital; that the books of the company be opened for subscriptions to said stock, and that each stockholder be allowed to take one share of said new stock for every five shares he now holds, and that when he pays eighty dollars on each share the company will issue to him a certificate as if for full-paid stock.

That a meeting of the board of trustees was held on the 8th day of February, 1866, at which resolutions were passed as follows:

"Resolved, That a dividend of four per cent. be paid at the office of the company, on the twentieth of February.

"Resolved, That a call of twenty per cent. on the new stock be
78 made, to be paid at the office of the company on the 20th of February, 1866; that the books of the company be opened at once for subscriptions to that stock, and that each stockholder have the privilege of taking one share of the new stock for every five shares they hold of the old, provided they take said new stock and pay to the company $20 on each share, on or before February 10th, 1866, and if any stockholder fails to pay the company twenty dollars on each share of the new stock they are entitled to on or before February 20th, 1866, they shall forfeit all claim to said new stock.

"Resolved, That provided there is on the 21st day of February, 1866, any of the 200,000 of new stock to be issued by this company, that the stockholder who was entitled to it has failed to pay into the company $20 on each share, it shall be equally divided among the stockholders in proportion to the amount of stock held by them who have paid into the company $20 on the proportion they were entitled to, and that the secretary shall at once advise each stockholder who is entitled to one share or more of said stock, the number of shares they are enti-
79 tled to, and provided they pay to the company $20 on each share on or before March 1st, 1866, the company shall issue the stock to said stockholder, and if they fail to pay $20 to the company on each of said shares allotted to them, then the president and secretary shall let any stockholder have said stock who will take it and pay $20 on each share, and if there is more of said stock applied for than there is left to be taken, within three days after the first of March, it shall be divided by the president and secretary between those applying in proportion to the amount of stock held by them."

That pursuant to the last above resolution a subscription agreement was issued by the trustees of said company in the words and figures following to wit:

"CONGRESS AND EMPIRE SPRING COMPANY.

"*Stock subscription.*

"We, the undersigned, hereby covenant and agree to take the number of shares of the capital stock of the Congress & Empire Spring Company set opposite our names respectively, and pay the company for each share eighty dollars, in installments as called for by the di-
80 rectors of said company, and if we fail to pay as called for by said directors, for sixty days after the time it is called for, we agree to forfeit to the company all sums that we have paid on said stock. The Congress and Empire Spring Company agree and bind themselves to pay interest on all sums paid on said stock to the holders from t day it is paid up to February 1st, 1867; and on the 8th day of Februa 1867, for all of said stock that eighty dollars has been paid on each sha they agree to issue a certificate to the holders for full-paid stock, wh the stock shall draw dividends and be treated the same as other full p stock. Provided there is any of said stock that there has not been paid to the company on each share February 1st, 1867, and said stock h not been forfeited to the company, the company shall be bound to p of only the interest on the sums paid on said stock until the first dividend

has been declared after $80 has been paid on each share. Said company also agree that the holders of said stock shall be entitled to vote at all times, the same as on full-paid stock, provided all calls due have been paid.

81 "SARATOGA SPRINGS, *Feb. 8th*, 1866."

That said agreement was signed by C. Sheehan, among others, as a subscriber for six hundred and ninety-nine shares of the said new stock; and the subscriptions embraced all, or nearly all, of the new stock. That an agreement was made between the plaintiff and the said Sheehan, whereby it was agreed that the said Sheehan would lend the plaintiff his dividend on his old stock for one year, and that the plaintiff would take the new stock subscribed for by the said Sheehan as aforesaid, and relieve him from further calls. That the plaintiff made his note to the said Sheehan for $13,980, dated February 20, 1866, payable one year from date, which the plaintiff caused to be delivered to him, with 150 shares of stock as collateral security to the note in the purchase and payment for, to that amount of the said dividend of the said Sheehan, and the said Sheehan received the said note with the said collateral security in payment for so much of said dividend on a sale thereof by him to the plaintiff. The whole amount of the dividend to the
82 said Sheehan was $13,988, being on 3,197 shares of old stock.

The sum of eight dollars thereof was paid by the defendant in cash to the said Sheehan.

That on or about the 8th of March, 1866, the plaintiff paid to the defendant the call of twenty per cent. on the said new stock so subscribed for by the said Sheehan, by the application thereon by the said defendant at the request of the plaintiff of $13,980 of the said dividend to the said Sheehan so as aforesaid to that amount purchased by the plaintiff, and thereupon the defendant gave to the plaintiff a receipt of its secretary, with a two-cent internal revenue stamp affixed thereto, of which the following is a copy:

$13,980.] "OFFICE OF THE CONGRESS AND EMPIRE SPRING COMPANY,
"*Saratoga Springs, February 20th*, 1866.

"Received of D. A. Knowlton, esq., thirteen thousand nine hundred and eighty dollars, it being the first installment of twenty per
83 cent. on 699 shares of stock standing in the name of D. A. Knowlton on the books of the Congress and Empire Spring Co., and said company agrees to pay interest on said $13,980 from this date up to February 1st, 1867, provided the amount now left unpaid on said stock is paid when called for by the directors of the company.

"W. R. JOHNSON, *Sec'y*."

[Internal revenue stamp, 2 cents cancelled.]

That the said note given by the plaintiff to the said Sheehan, as aforesaid was paid and satisfied by the plaintiff to the said Sheehan, in or about the month of December, 1866, before maturity, as follows: $7,500 $15,000 of stock of the said company at fifty cents on the dollar and the balance in cash and checks.

That calls subsequent to the aforesaid calls thereon of twenty per cent. for payment of installment upon the stock so as aforesaid subscribed by the said Sheehan, were duly made by the trustees of the said company and a personal demand therefor was duly made upon the said

Sheehan and the said plaintiff, more than sixty days before the
84 25th day of January, 1867, and the plaintiff and the said Sheehan neglected and refused to make payment thereon in pursuance of said calls and demands, whereupon the trustees of the defendant proceeded to forfeit the payment upon said stock, and the interest of the plaintiff and said Sheehan in said stock by passing the resolution in that behalf in substance set forth in the complaint as follows:

"Resolved, that the 812 shares of new stock, viz: 699 shares subscribed by C. Sheehan, and standing in the name of D. A. Knowlton, &c., &c., &c., on which calls have been made, and remained delinquent, for over sixty days, are hereby declared forfeited to the company in accordance with the terms of subscription."

That from August, 1865, to August, 1866, the plaintiff was a trustee and the vice-president of said company; that he actively participated by advice and counsel in the proceedings for increasing the capital stock of the said company, and prepared and offered the resolutions in relation thereto set forth in the complaint; that he presented and moved
85 the adoption of the said resolution for a dividend, and prepared the said subscription agreement and signed and advised signatures thereto and prepared the form of the receipt.

That a meeting of the stockholders of the defendant was held on the 7th of Aug., 1867, at which a resolution was passed as follows:

"Resolved, That the capital stock of this company be reduced to the original capital of $1,000,000, and that the trustees of the company be, and hereby are, authorized to adjust with the owners, or holders of the two thousand shares heretofore increased, or intended to be added to the capital stock or any part thereof, or with their assigns for retiring said stock so authorized to be increased, on such terms and conditions as the said directors shall deem for the interest of the company."

That a meeting of the board of trustees of the said company was held on the same day at which a resolution was adopted as follows:

"Resolved, That the authority this day conferred upon this board by the stockholders of this company, in regard to the retiring and cancelling of the stock of this company down to the sum of $1,000,000 is hereby conferred upon the executive committee, and said committee are hereby authorized to adjust the claims of all persons holding
86 receipts for payments on the new stock of the company, on such terms as to price and payment as shall be deemed by said committee for the best interest of the company."

That the said executive committee on the 27th day of March, 1868, adopted a resolution as follows:

"Resolved, That the Congress and Empire Spring Company issue five years coupon bonds of the form adopted at prior meeting, in sufficient amount to retire and pay off the outstanding receipts for payments on new stock of the company, which stock was authorised to be retired by vote of the stockholders at the August meeting, 1867, and the said bonds are not to be sold or negotiated in exchange for receipts at less than par for said bonds."

That such bonds were never tendered to or demanded by the plaintiff's intestate; that the plaintiffs' intestate demanded repayment of the money so paid by him on said subscription for said new stock, and that defendant wholly refused to make such repayment.

That most of the old stockholders became subscribers for the
87 new stock, and that all the subscribers for the new stock other than the said Sheehan, and the plaintiff as to the subscription of the said Sheehan, and one or two subscribers for small amounts paid

the calls upon them in respect to said new stock; that the said first call of twenty per cent. was paid mostly by the div dend, but about $3,000 was paid in cash; that all the stockholders who did not subscribe for said new stock were paid their portions of said dividend in cash; that about $86,500 of bonds were issued by the company to retire the said new stock; that about $18,500 thereof have been paid, and about $68,000 are outstanding; that $2,600 in addition has been paid in cash to retire said stock. That the said Dexter A. Knowlton, having commenced this action, died during the pendency thereof, and that the plaintiffs, as his administrators, have succeeded to his interest therein.

The defendant's counsel requested the judge who tried the cause to decide that the proceedings of the defendant in increasing their capital stock, and in forfeiting the amount paid by plaintiff's intestate were in all respects legal and valid.

88 The judge refused so to find, and ruled that the plan devised by the plaintiff's intestate and the other trustees of defendant was contrary to the provisions of the statute under which the defendant was organized, and a fraud upon stockholders not consenting thereto, and the public, and against public policy, to which refusal and ruling defendant's counsel duly excepted.

The defendant's counsel requested the judge to decide that inasmuch as the plaintiff's intestate devised, counseled, and assisted in passing and adopting all the acts and resolutions for an increase of stock by the defendant, that therefore plaintiffs are not entitled to recover in this action. The judge refused so to find and decide, and ruled that the plaintiff's intestate had a right to abandon the illegal transaction to which he was a party, and by declining to pay further calls, and by demanding repayment of the payments made before the consummation of the illegal scheme, did abandon, and was entitled to recover—to which refusal and ruling the defendant's counsel duly excepted.

89 And as a conclusion of law, the court finds that the plaintiffs are entitled to a judgment against the defendant for the sum of $13,980, with interest from February 20th, 1866, making a total amount of twenty-five thousand six hundred and eighty-seven dollars and eighty-five cents, with the costs of this action.

To which finding and conclusion the defendant duly excepted.

And, inasmuch as the facts so found, and the objections so made and taken, and the proceedings thus had upon the trial, do not appear by the record of said trial and of the judgment aforesaid, the counsel for the defendant did then request the court to make special findings of the facts upon which judgment was directed, and did then and there except to the opinions and rulings of the said court, and requested the said court to put its seal to this finding, containing the said several facts so proven and objections and exceptions thus made and taken, according to the law and practice of the court; and thereupon the district judge, at the request of the said counsel for the defendant, has hereunto affixed his name and put his seal.

WM. J. WALLACE,
*U. S. Dist. Judge.*

90 (Indorsed:) United States circuit court, northern district of New York. Dexter A. Knowlton jr., and others, vs. the Congress and Empire Spring Company. Copy exceptions. Charles S. Lester, del'ts' att'y. Filed Feb. 11, 1878.

91 United States circuit court, northern district of New York.

DEXTER A. KNOWLTON,
*against*
THE CONGRESS AND EMPIRE SPRING COMPANY.

WALLACE, *J.*:

This case comes here by removal from the State court after a decision adverse to the plaintiff by the commission of appeals reversing the judgment of the supreme court in favor of plaintiff and ordering a new trial. (57 N. Y. R., 518.)

The plaintiff seeks to recover $13,930, paid by him to the defendant upon a subscription for shares of its capital stock.

The defendant, by the action of its directors and stockholders, instituted proceedings for an increase of its capital, and the subscription agreement was prepared and executed in furtherance of that object. It has been assumed in the arguments of counsel that these proceedings were illegal, as in contravention of the statute under which the
92 defendant was organized, and constructively fraudulent as to the public and all stockholders not assenting thereto, and the decision of the case in the State courts has been adjudicated upon that assumption. The plaintiff was a stockholder and trustee of the defendant, and participated actively in these proceedings.

The subscription agreement provided that the subscribers should pay the defendant for the new shares in installments, as called for by the directors, and upon failure to pay any call for sixty days, should forfeit all sums theretofore paid upon the subscription. Plaintiff paid the sum in controversy upon the first call under the subscription, but failed to respond to subsequent calls for more than sixty days. After a resolution had been passed by the directors forfeiting plaintiff's rights for delinquency, but before any scrip was issued for the new stock, and while the proceedings were inchoate, the stockholders resolved to aban-
93 don the project to increase the stock, and pursuant to this action the directors adjusted with parties who held receipts for payments under the subscription by giving them the bonds of the defendant issued for that purpose. No bonds were tendered to the plaintiff. He demanded repayment of the money paid upon the subscription, and being refused, brought this action.

If the subscription agreement was valid the plaintiff can have no redress, but must be held to his stipulation to forfeit the payment for his delinquency in responding to subsequent calls.

The defendant had become entitled to the plaintiff's money by the terms of the subscription agreement at the time it concluded to abandon the scheme for increasing its capital, and however hard and inequitable it may seem that defendant should retain this money, while abandoning the project for which it was received, its legal right so to do is clear.

On the other hand, if the subscription was executed as part of an illegal scheme, it is void in all of its conditions, and the defendant can
94 take nothing under the color of the forfeiture stipulated for. The sole question in my view, therefore, is, whether the plaintiff will be permitted to recover money paid in partial performance of an illegal transaction. The defendant has no right to the money unless that of possession under circumstances which deny to the plaintiff the assistance of the court in reclaiming it.

Certain propositions applicable to the present case are not debatable.

Courts of justice refuse to entertain any application to enforce a contract or transaction which is immoral or subversive of public policy, or in contravention of a statute.

When the transaction has been consummated or the contract has been executed, if the parties to it are in pari delecto, neither will be permitted to recover money or property delivered to the other in furtherance of it. When the law which the transaction contravenes is designed for the coercion of one party or the protection of the other, or where one party is the principal offender and the other acquiesces by con-
95 straint of circumstances, the parties are not in pari delecto, and the lesser offender will be relieved, although the illegal transaction has been consummated.

So far there is no diversity of opinion among text writers or in the reported cases.

Another proposition of controlling importance in this case, advanced by all the commentators and sanctioned by many decisions has been denied by the high authority of the commission of appeals, which is, that where the contract or transaction is but partially performed there is a locus pœnitentiæ, and either party may rescind.

In deciding the present case the commission of appeals (Dwight, commissioner, dissenting), have held that money paid by one party in part performance of an illegal transaction cannot be recovered back where both parties are in pari delecto, and that no distinction exists as to the right of recovery between cases of partial and of entire performance.

96 Notwithstanding the great respect which I entertain for the authority of the commission of appeals, I am constrained to differ from the conclusion thus reached, and must hold in the language adopted by Mr. Justice Bradley (Thomas v. City of Richmond, 12 Wal., 355), "a recovery can be had as for money had and received where the illegality consists in the contract itself, and that contract is not executed; in such case there is a locus pœnitentiæ, the delictum is incomplete, and the contract may be rescinded by either party."

This statement of law finds support in the early case of Walker vs. Chapman (Lofft., 342), where the plaintiff had paid money to procure a place in the customs, but which he did not get, and brought suit to recover back the payment, and Lord Mansfield decided in his favor, and upon the authority of this case is the subsequent case of Lowery vs. Bourdien (Doug., 468), which was an action to recover a premium paid upon an insurance which was merely a gaming contract, but was brought after the event had happened upon which the insurance was
97 to be paid. Butler, J., said: "There is a sound distinction between contracts executed and executory," and the plaintiff was defeated because the agreement was not executory.

In Tapenden vs. Randall (2 Bos. & P., 466), an action was maintained to recover a payment upon an illegal contract, Heath, J., after adverting to the distinction between executed and executory contracts, stated by Justice Butler, saying, "I think there ought to be a locus pœnitentiæ, and that a party should not be compelled to adhere to his contract."

In Hazleton vs. Jackson (8 B. & C., 221), Littledale, J., says: "If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards"; and a recovery was allowed on this ground.

Other cases which proceeded upon the same rule are: Auburt vs. Walsh

(4 Taunt., 277); Bush vs. Walsh (Ib., 291); Bone vs. Eckless (1 Hurls. and Nor. (exch.), 925). The same doctrine has been recognized in
98 our own courts: White vs. Franklin Bank (22 Pick., 184); Nellis vs. Clark (4 Hill, 424); Morgan vs. Groff (4 Barb., 526); and in the latest English case, Taylor vs. Bowers (34 Law Times, N. S., 938), decided in the court of appeals in 1876, the plaintiff was permitted to recover property transfered to defraud creditors, where the scheme was not fully carried out, Mellish, L. J., saying: "If money is paid or goods delivered for an illegal purpose and that purpose is afterwards abandoned and repudiated, I think the person paying the money or delivering the goods may recover; but if he waits until the illegal transaction is carried out or seeks to enforce it he cannot maintain his action."

In opposition to these authorities there is not a single case of which I am aware sustaining the conclusion of the commission of appeals. The cases cited in support of that conclusion in the opinion of Lott, Ch. C., are: Perkins vs. Savage (15 Wend., 412); Bell ex parte
99 (1 M. & S., 751); Howson vs. Hancock (8 Tenn., 575); Bush vs. Place (6 Cow., 431), and the Saratoga County Bank vs. King (44 N. Y., 92).

In none of these cases did the question arise whether the plaintiff could succeed in an action in disaffirmance of an unexecuted illegal contract.

In conclusion, I concur in the dissenting opinion of Dwight, com'r, "That the rule is well stated in 2 Comyn on Cont., 109, if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back his deposit." A different rule would hold out an inducement to parties to an illegal transaction to persevere in their efforts to violate the law.

That the transaction in furtherance of which the payment was made has never been consummated is clear. Before any stock was issued the scheme to issue it was rescinded by the defendant. The real question is, was the locus pœnitentiæ open to the plaintiff at the time he brought this suit. He had declined to respond to the second call when the
100 defendant rescinded. Can there be any doubt that up to the time of the abandonment of the scheme by the defendant the plaintiff could have resorted to a court of equity and restrained further proceedings and vacated the proceedings already taken. The cases are numerous where courts of equity have interfered to prevent the consummation of a wrong upon the motion of a party who was instrumental in its inception. It is laid down by Judge Story (1 Equity Jur., § 298) that "when the agreements or other transactions are repudiated on account of being against public policy, the circumstance that the relief is asked by a party who is particeps criminis is not in equity material. The reason is that public interest requires that relief should be given, and it is given to the public through the party. And in these cases relief will be granted not only by setting the agreement or transaction aside, but also in
101 many cases by ordering a repayment of any money paid under it." See also Neville vs. Wilkinson (1 Brown Ch. Rep. 473, note A).

If the plaintiff had received the fruits of the illegal transaction in equity as at law, he could not have recovered his payment, but until then not only could he have been heard, but restitution would have been made to him.

The locus pœnitentiæ was open to the plaintiff so long as he was in a position to resort to a court of equity, and surely it was not closed to him by the action of the defendant in rescinding the illegal scheme. After that action on the part of defendant the plaintiff took the

only steps he could take in repudiation of the transaction by demanding his money and bringing his suit. He is not to be denied relief upon the theory that the delictum was complete.

It is claimed that no payment was in fact made of the sum sought to be recovered by plaintiff. A dividend of four per cent. had been declared by the defendant to its stockholders, among them to Sheehan,
102 who transferred his interest to the plaintiff, and the dividend, instead of being paid in money, was credited, by an agreement, as a payment of the first call under the subscription. Stockholders who did not subscribe for the new stock were paid in money. The evidence does not justify the inference that the dividend was a fictitious or fraudulent one.

The defendant has treated the dividend as though actually paid, not only in crediting it as a payment, but in its dealings with the other stockholders, and it is now too late to question its validity. The plaintiff bought it of Sheehan and paid for it in full. His rights are the same as though he had borrowed the money of Sheehan to make the payment of the call.

Judgment is ordered for plaintiff for $13,980.00, with interest from Feb'y 20, 1866.

103, 104 (Indorsed:) United States circuit court, northern district of N. Y. Dexter A. Knowlton vs. The Congress and Empire Spring Company. Copy. Copy opinion. Wallace, J. Filed Dec. 24, 1877.

105 Supreme Court of the United States.

DEXTER A. KNOWLTON, JR., AND CHARLES D. Knowlton, as administrators, &c., of Dexter A. Knowlton, deceased.
*vs.*
THE CONGRESS AND EMPIRE SPRING COMPANY.

Know all men by these presents that we, The Congress and Empire Spring Company, Eliza Sheehan and James M. Andrews, all of Saratoga Springs, N. Y., are held and firmly bound unto Dexter A. Knowlton, jr., and Charles D. Knowlton, as administrators, &c., of Dexter A. Knowlton, deceased, in the sum of forty thousand dollars, to be paid to the said Dexter A. Knowlton, jr., and Charles D. Knowlton, as administrators, &c., their successors and assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, and administrators firmly by these presents, and for the payment thereof the said Eliza Sheehan doth hereby charge her separate estate. Sealed with our seals and
106 dated this first day of March, one thousand eight hundred and seventy-eight.

Whereas the above-named Congress and Empire Spring Company hath presented a writ of error of the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of New York, and docketed on the 25th day of February, 1878:

Now, therefore, the condition of this obligation is such, that if the above-named Congress and Empire Spring Company shall prosecu e its said writ of error to effect, and answer all costs and damages if

it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

CONGRESS & EMPIRE SPRING CO.,
By C. C. DAWSON, *Sec'y.* [L. S.]
ELIZA SHEEHAN. [L. S.]
JAMES M. ANDREWS. [L. S.]

Sealed and delivered in the presence of—
CHARLES C. LESTER.

STATE OF NEW YORK,
*Saratoga County, ss:*

Eliza Sheehan, one of the subscribers to the foregoing under-
107 taking, being duly sworn, saith that she is a resident and freeholder within this State, and is worth the sum of forty thousand dollars over and above all her debts and liabilities, and besides her property by law exempt from execution.

ELIZA SHEEHAN.

Sworn before me this first day of March, 1878.
CHARLES C. LESTER,
*Notary Public.*

STATE OF NEW YORK,
*Saratoga County, ss:*

James M. Andrews, one of the subscribers to the foregoing undertaking, being duly sworn, saith that he is a resident and freeholder within this State, and is worth the sum of forty thousand dollars over and above all his debts and liabilities, and besides his property by law exempt from execution.

JAMES M. ANDREWS.

Sworn before me this first day of March, 1878.
CHARLES C. LESTER,
*Notary Public.*

108 STATE OF NEW YORK,
*Saratoga County:*

On this first day of March, in the year one thousand eight hundred and seventy-eight, before me personally appeared Eliza Sheehan, wife of Cornelius Sheehan, to me known to be one of the individuals described in and who executed the foregoing instrument, and acknowledged that she executed the same; and the said Eliza Sheehan, upon a private examination by me, separate and apart from her said husband, acknowledged that she executed the same freely and without any fear or compulsion of her said husband.

CHARLES C. LESTER,
*Notary Public.*

STATE OF NEW YORK,
*County of Saratoga, ss:*

On this first day of March, 1878, before me personally appeared James M. Andrews, to me known to be one of the individuals described in and who executed the foregoing instrument, and acknowledged that he executed the same.

CHARLES C. LESTER,
*Notary Public.*

109 STATE OF NEW YORK,
*County of Saratoga, ss:*

On this 1st day of March, 1878, personally appeared before me Charles C. Dawson, with whom I am personally acquainted, who being by me duly sworn, did depose and say that he resided in the village of Saratoga Springs, in said county, and was the secretary of the Congress & Empire Spring Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by authority of the board of trustees of the said company, and that he signed the name of the said company by like authority of the said board of trustees to the said instrument.

CHARLES C. LESTER,
*Notary Public.*

110 (Indorsed): Supreme Court of the United States. The Congress and Empire Spring Company, pl'ff in error, ag'st Dexter A. Knowlton, jr., and another administrator, &c., def'ts in error. Copy. Bond on appeal. Charles S. Lester, Saratoga Springs, N. Y., att'y for pl'ff in error.

Approved March 4, 1878.

WM. J. WALLACE,
*U. S. Dist. Judge.*

Filed M'ch 6, 1878.

111 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you between Dexter A. Knowlton, jr., and Charles D. Knowlton, administrators of Dexter A. Knowlton, deceased, plaintiff, and the Congress and Empire Spring Company, defendant, a manifest error hath happened, to the great damage of the said The Congress and Empire Spring Company, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you
112 send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this twenty-eighth day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] CHARLES MASON,
*Clerk of the Circuit Court of the United States.*
*Northern District of New York.*

Allowed.

WM. J. WALLACE,
*U. S. Dist. Judge.*

113, 114 (Indorsed): In the circuit court of the United States for the northern district of New York. Dexter A. Knowlton and Charles D. Knowlton, adm'ors of Dexter A. Knowlton, dec'd, def'd'ts in error, vs. The Congress and Empire Spring Company, pl'ff in error. Writ of error. Charles S. Lester, Saratoga Springs, att'y for pl'ff in error. Filed M'ch 6, 1878.

115 *Affidavit of service by mail.*

Supreme Court.

THE CONGRESS & EMPIRE SPRING COMPANY, pl'ff in error,
*vs.*
DEXTER A. KNOWLTON, JR., AND CHARLES D. Knowlton, as administrators, &c., of Dexter A. Knowlton, deceased, def'ts in error.

STATE OF NEW YORK,
*Saratoga County, ss:*

James J. Campion, of Saratoga Springs, in said county, being duly sworn, deposes and says, that on the fifth day of March, 1878, at Saratoga Springs, N. Y., he served a copy of the annexed citation on Starr & Ruggles, attorneys for defendants in error in this action, by depositing the same in the post-office at Saratoga Springs, county of Saratoga, properly enclosed in a sealed envelope, and directed on the outside to said Starr & Ruggles, at New York City, where Starr & Ruggles have their place of business, and prepaying the legal postage thereon. That between said Saratoga Springs, N. Y., and said New York City there is a regular communication by mail.

JAMES J. CAMPION.

Sworn to before me this 8th day of March, 1878.

J. L. LEAKE.
*Notary Public.*

116 UNITED STATES OF AMERICA, *ss:*

To Dexter A. Knowlton, jr., & Charles D. Knowlton, as administrators, &c., of Dexter A. Knowlton, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein The Congress & Empire Spring Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this fourth day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

WM. J. WALLACE,
*U. S. Dist. Judge.*

117 (Indorsed): U. S. Supreme Court. The Congress & Empire

Spring Company, plaintiff in error, against Dexter A. Knowlton, jr., & another administrator of Dexter A. Knowlton, deceased, defendants in error. Citation. Charles S. Lester, Saratoga Springs, att'y for pl'ff in error. Filed M'ch 9, 1878.

118 UNITED STATES OF AMERICA, *ss:*

To Dexter A. Knowlton, jr., and Charles D. Knowlton, as administrator, etc., of Dexter A. Knowlton, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein the Congress & Empire Spring Company, plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this fourth day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

WM. J. WALLACE,
*U. S. Dist. Judge.*

119 (Indorsed): U. S. Supreme Court. The Congress & Empire Spring Company, plaintiff in error, against Dexter A. Knowlton, jr., & another administrator of Dexter A. Knowlton, deceased, defendant in error. Copy citation. Charles S. Lester, Saratoga Springs, att'y for pl'ff in error.

We admit service of a copy citation, of which the within is a copy, this 6th day of March, 1878.

STARR & RUGGLES,
*Pl'ff's Att'ys.*

Filed March 16, 1878.

120, 121 UNITED STATES OF AMERICA,
*Northern District of New York, ss:*

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of Dexter A. Knowlton, jr., and Charles D. Knowlton, as administrators, &c., vs. The Congress and Empire Spring Company.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Utica, this 27th day of August, A. D. 1878.

SEAL.] CHARLES MASON, *Clerk.*

122 Supreme Court of the United States.

THE CONGRESS & EMPIRE SPRING COMPANY, pl'ff in error,
*vs.*
DEXTER A. KNOWLTON, JR., AND CHARLES D. Knowlton, as administrators, etc., of Dexter A. Knowlton, deceased, def'ts in error.

Of the term of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Afterwards, to wit, on the day of October, in this same term, before the justice of the Supreme Court of the United States at the Capitol at the city of Washington, comes the said The Congress & Empire Spring Company, by Charles S. Lester, of Saratoga Springs, its attorney, & says, in the record and proceedings aforesaid, & also in giving the judgment aforesaid, there is manifest error in this, that the judge who tried the cause erred in deciding that the defendants in error were entitled to judgment upon the facts found, and also in making the decisions set forth in the bill of exceptions; and also there is error in this,

123 that the judgment aforesaid by the record aforesaid appears to have been given for the said Dexter A. Knowlton, jr., and Charles D. Knowlton, as administrators, etc., of Dexter A. Knowlton, deceased, against the said Congress & Empire Spring Company, whereas by the law of the land the said judgment ought to have been given for the *for the* said The Congress & Empire Spring Co. against the said Dexter A. Knowlton, jr., & Charles D. Knowlton, as administrators, etc. And the said The Congress & Empire Spring Company prays that the judgment aforesaid, for the errors aforesaid & for other errors aforesaid in the said record & proceedings being, may be reversed, annulled, and altogether holden for naught, and that said Congress & Empire Spring Company may be restored to all things which it hath lost by occasion of the said judgment, etc.

CHARLES S. LESTER,
*Attorney for Pl'ff in Error.*

(Indorsed:) Supreme Court of the United States. The Congress & Empire Spring Company, pl'ff in error, ag't Dexter A. Knowlton, jr., and another administrator, etc., def'ts in error. Assignment of errors. Charles S. Lester, att'y for pl'ff in error.

(Indorsed:) Supreme Court of the United States. The Congress and Empire Spring Company, pl'ff in error, vs. Dexter A. Knowlton, jr., & an., administrators, &c., def'ts in error. Writ of error. Return.

(Indorsement on cover:) No. 476. The Congress and Empire Spring Company, plaintiffs in error, vs. Dexter A. Knowlton, jr., and Charles D. Knowlton, as adm'rs of Dexter A. Knowlton, dec'd. N. New York C. C. U. S. Filed 14th September, 1878.

OFFICE SUPREME COURT U. S.
FILED
JAN 7 1881
JAMES H. McKENNEY, Clerk.

# Supreme Court of the United States.

## OCTOBER TERM, 1880.

*No. 200.*

THE CONGRESS AND EMPIRE SPRING COMPANY,
PLAINTIFF IN ERROR,

*vs.*

DEXTER A. KNOWLTON, JR., AND CHARLES D. KNOWLTON, AS ADMINISTRATORS OF D. A. KNOWLTON, DECEASED, DEFENDANTS IN ERROR.

## STATEMENT OF CASE.

The case comes before the court by writ of error to the circuit court of the United States for the northern district of New York.

The suit was brought, in 1869, by the intestate, Mr. Knowlton, against the plaintiff in error in the supreme court of the State of New York to recover from the defendant $13,980, with interest from the 20th of February, 1866.

It was first tried in the State court before a referee, who ordered judgment in favor of the plaintiff below; this judgment was reversed by the commission of appeals of the State of New York, in 1874, on the ground that the plaintiff was not entitled to recover, and a new trial was ordered.

See 57 New York Reports, Com. of Appeals, p. 518.

In 1876 the plaintiff below died, and D. A. and C. D. Knowlton were appointed his administrators, and the suit was revived and continued in their name as administrators. (Record, folios 31, 32, 34.)

At the time of his death the deceased was a citizen and resident of Illinois, and his administrators were citizens and residents of that State. (Record, folios 34, 39, 40.)

On their application the suit was removed into the circuit court of the United States for the northern district of New York. (Record, folios 33 to 51.)

The attorneys, by stipulation, waived a jury. (Record, folio 51.)

The action was tried by the court held by Judge Wallace in October, 1877.

He ordered judgment against the defendant below for the amount claimed, with interest, making $25,687.85.

The complaint is at folios 3 to 14 of record. The answer at folios 15 to 25. The bill of exceptions containing the findings of fact, rulings and exceptions is at folios 75 to 90 of record.

The following are the material facts of the case:

The Congress and Empire Spring Company was organized as a corporation under and by virtue of the statute of New York authorizing the formation of corporations for manufacturing, &c., passed February 17, 1848, and the acts amending the same.

See chapter 40 of the laws of 1848, found in the *sixth* edition of the Revised Statutes of New York, vol. 2, p. 499, &c.

See also chapter 63 of the laws of 1863, found in 2d vol. of Revised Statutes, p. 510, §§ 68 and 69.

Complaint, Record, folio 3. Finding, folio 76.

The corporation was organized with a capital stock of

$1,000,000, divided into 10,000 shares of $100 each. This was paid for by property purchased by the corporation. (Complaint, folio 4, Finding 76, Laws of 1853, chapter 333, sec. 2, found in 2d vol. of Revised Statutes, p. 505, § 40.

The corporation was authorized by the act of 1848 to increase its capital stock.

See chapter 40 of laws of 1848, §§ 20, 21, 22, found 2 Revised Statutes, pp. 507, 508, § 55, &c.

The act of 1848 requires that the stock of a corporation formed under it shall be paid to the corporation in full, either in money or in property necessary for its business, taken at the fair value thereof.

2 Revised Statutes, 6 Ed., p. 507, sec. 49.
The same, p. 505, sec. 40.

Any scheme by which the corporation is to create and treat stock as full paid stock, without receiving, therefor, in money or necessary property, its par value, is in violation of the letter and spirit of the statute and of the public policy of the State of New York.

2 Revised Statutes, supra.

See also 2 Revised Statutes, p. 504, secs. 33, 38; p. 505, sec. 41; p. 506, sec. 48; 57 N. Y., p. 518; 529 per Lot; p. 536 per Reynolds; per Dwight, p. 540.

Early in 1866 proceedings were taken to increase the capital stock of the corporation $200,000, making 2,000 additional shares of stock of $100 each.

On the 11th of January, 1866, the board of trustees passed a resolution that the stock be increased $200,000 for the purpose of manufacturing bottles for the water and creating a working capital; and that each stockholder be allowed to take one share of the new stock for every five shares of the old stock held by him; "and that when he

pays $80 on each share, the company will issue to him a certificate *as if for full paid stock.*" (Complaint, folio 4; Findings, folio 77.)

A meeting of the stockholders was called and held on the 8th day of February, 1866, at which stockholders representing a larger amount than two-thirds of the capital stock of the corporation voted in favor of the proposed increase of the stock. (Complaint, folio 5; Answer, folios 17 and 18.)

On the same 8th of February the board of trustees of the corporation passed the three resolutions set out in the findings on page 21 of the Record. By the first a dividend of 4 per cent. on the old capital stock is declared payable on the 20th of February, at the office of the company.

By the second resolution a call of 20 per cent. on the new stock is made payable, at the office of the company, on the same 20th of February; the books of the company are ordered to be opened at once for subscriptions to the new stock; and each stockholder is to have the privilege of taking one share of the new stock for every five shares he holds of the old, provided he takes and pays on each share 20 per cent. on or before *February* 20, 1866.

(February 10th in this resolution is erroneously printed. It should be 20th. (See Complaint, folio 5; Answer, folios 15, 16; Findings made by the judge in judgment, Record, folio 58.)

On the same 8th of February a subscription agreement was prepared, which was executed by the parties wishing to take new stock. (Record, folios 79 and 80.)

By this the subscribers severally agreed to take the number of shares of stock set opposite his name, and pay the company for each share, *eighty dollars* in installments, as called for by the directors, and if he fails to pay for sixty days after an installment is called for, he agrees to forfeit to the company all sums paid on the stock by him.

The company agrees to pay the holder interest on all

sums paid on said stock from the date of payment to February 1, 1867; and on the 8th of February, 1867, the company agrees to issue certificates for full paid stock for all of said stock for which $80 per share shall have been paid; and then the stock shall draw dividends and be treated *as full paid stock.*

It further provides that the holders of this stock shall be entitled to vote on it the same as on full paid stock, provided all calls due on it have been paid. (Record, folio 80.)

C. Sheehan owned 3,497 shares of the old stock. This, under the scheme, gave him the privilege of taking 699 shares of the new stock. He subscribed the agreement for this number of shares, under an agreement with Knowlton, that he, Sheehan, would loan Knowlton for a year his dividend of four per cent. on his 3,497 shares of old stock, payable on the 20th of February, and that Knowlton should take the new stock subscribed for by Sheehan, and indemnify the latter from further calls.

The dividend on Sheehan's old stock amounted to $13,988.

The 20 per cent. on the 699 shares of new stock amounted to $13,980. Knowlton gave Sheehan his note for this amount of his dividend; the corporation, at the request of Knowlton, applied this amount of dividend as payment of the 20 per cent. called on the 699 shares of new stock; and received from the company the receipt set out. This is the only pretense of payment ever made on the 699 shares of stock. (Record, folios 81, 82 and 83.)

Afterwards other calls were made by the company for the payment of further installments on the 699 shares, and demands made on Knowlton and Sheehan for payments thereof.

They neglected and refused to pay for more than 60 days, and the company, in January, 1867, forfeited the stock and all payments made thereon. (Record, folios 83, 84, 80.)

From August, 1865, to August, 1866, the plaintiff was

one of the trustees and the vice-president of the corporation.

He, as a stockholder and trustee, actively participated in originating and carrying out this scheme for increasing the stock. He prepared and offered the resolutions in relation thereto set out in the record. He presented and moved the adoption of the resolution for the 4 per cent. dividend on the old stock, and prepared and signed and advised others to sign the subscription agreement for stock. (Record, 84, 85.)

The rulings of the court and exceptions thereto are on page 24 of record.

ASSIGNMENTS OF ERRORS.

First. If the scheme or plan to increase the stock of the corporation devised by the plaintiff's intestate and his associate trustees was legal and valid, the plaintiffs were not entitled to recover; and the court below erred in the refusal and ruling first made. (Record, folio 88.)

The alleged payment of the first installment on the stock which is sought to be recovered herein from the corporation was legally and duly forfeited on the 25th of January, 1867, for default in the non-payment of subsequent installments.

Subscription agreement, folio 80.
Subsequent calls and resolutions, folio 83½, 84.
Complaint, folio 10; 2 R. S. of N. Y., 6th edition, p. 504, sec. 33.
Opinion of the court below, folio 93.

Second. For a second assignment of errors the counsel for the plaintiff in error alleges and insists that the Circuit Court erred in refusing to rule and decide that the plaintiffs were not entitled to recover, and also in ruling and deciding that the plaintiffs were entitled to recover the $13,980 and

interest thereon from February 20, 1866. (Record, fols. 88, 89.)

I. The scheme and contract to increase the stock were in violation of the statute under which the corporation was organized and against public policy. They were illegal and fraudulent.

1st. This was so held *in this case* by the court of last resort in the State of New York on the same statute and facts.

57 N. Y. Reports, 518–527 per Lot, p. 536 per Reynolds, 540 per Dwight.

This was also the finding and decision of the U. S. Circuit Court. (Record, fol. 88.)

2d. The statute expressly required that all stock should be paid for at its par value in money or in property necessary to the company in carrying on its corporate business.

2 Revised Statutes of N. Y., 6th ed., p. 507, sec. 49. *Ib.*, p. 505, sec. 40; *Ib.*, p. 504, sec. 38; *Ib.*, p. 505, sec. 41.

3d. The scheme under consideration was in violation of the terms of the statute and the public policy of the State of New York. It was a scheme wherein it was expressly stipulated and agreed that scrip for stock should be issued of the nominal or par value of $100 per share on payment of only $80 per share, and the first installment of $20 of the $80 was intended to be and was paid by applying a dividend of 4 per cent. declared on the old stock as such payment.

This dividend was part and parcel of the scheme; so that the corporation by the scheme and contract was to and would actually receive in money for the new stock only $60 per share from the subscribers thereof.

Resolution of trustees of January 11, 1866. (Record, fol. 77.)

Stockholders' meeting on the 8th of February, 1866; Compt., fol. 5; Ans., fol. 18; Subscription Agreement, fol. 80; Finding, fol. 82.

II. The plaintiff's intestate was *particeps criminis* and *in pari delicto* as to this illegal and fraudulent scheme and contract. Indeed he was more guilty than the corporation.

The law and public policy violated by this scheme and contract were for the protection of the stockholders not assenting to it, creditors and the public.

The corporation could only and did become a party to the scheme and contract by the action of its trustees and officers.

The plaintiff's intestate was a trustee, vice-president of, and a stockholder in the corporation when this scheme was originated and carried out as far as it was carried out between him and the corporation. (Record, fol. 84½.) He originated the illegal scheme, and as a trustee and stockholder actively promoted it and participated in carrying it out. (Record, fol. 84½.)

He prepared and as a trustee offered and voted for the resolution of January 11, 1866. (Record, fols. 77 & 84½.)

He as a trustee united in calling the meeting of stockholders. (Record, fols. 17, 84½.)

He as a stockholder voted for the increase of stock. (Record, fols. 5 & 84½.)

As trustee he prepared, offered, and voted for the resolulution passed the 8th of February, 1866. (Record, fols. 77, 78, 79, 84½.)

He prepared, signed and advised others to sign the subscription agreement to take stock. (Record, fols. 80, 84½.)

He participated in the arrangement by which the dividend declared was applied as payment of the first call on the new stock, and prepared the receipt given him therefor. (Record, fols. 82, 83, 85.)

It certainly cannot be successfully claimed that the person

who as an officer of a corporation by his advice, votes, and action involves the corporation in an illegal and fraudulent scheme, and who as an individual becomes a party to this scheme with the corporation, is not at least *in pari delicto* with the corporation. In fact and in law he is *the* criminal.

Thomas *vs.* City of Richmond, 12 Wallace, 349 & 356, per Bradley, J.

III. On these facts the plaintiff's intestate was not entitled to recover either in a court of law or equity from the corporation the $13,980, with interest from the 20th of February, 1866.

1st. Where the scheme or contract is *malum in se*, as in the case at bar, and the parties to it are *in pari delicto*, the law refuses to aid either of them in reference to it against the other. It leaves them where they have placed themselves by their own acts.

Smith on Contracts, 3 Am. Edition, star paging, 187 to 191.

Burt *vs.* Place, 6 Cowen's N. Y. R., 431.

Nellis *vs.* Clarke, 20 Wendell, 24.

Same case in error, 4 Hill, 424.

Smith *vs.* Hubby, 1 Fairfield R. (Maine), 71.

Schermerhorn *vs.* Talman, 14 N. Y. R., 94, per Denio, p. 141.

Knowlton *vs.* Cong. & Emp. Spring Co., 57 N. Y., 518.

Howson *vs.* Hancock, 8 Term R., 575.

(1st.) This rule of law applies where money has been paid by the one party to the other and applied in part execution or performance of the illegal scheme or contract the same as where it has been fully executed.

Smith on Contracts, *supra*, p. 187, says:

"I have hitherto spoken of illegality as avoiding a contract, and of course as operating by way of defense to any action brought upon the contract which it affects. But put the case that an illegal contract has been in part performed; that money for instance has been paid in pursuance of it; *no action will lie to recover that money back again.*"

The same author at page 188 says:

"Where money is paid in pursuance of an illegal contract the consideration of course fails; for it is impossible for the party who has paid the money to enforce the performance of the illegal contract. Still no action will lie to recover it back again. The reason of this is that the law will not assist a party to an illegal contract."

In the case of Nellis *vs.* Clarke, 20 Wendell, *supra*, the rule is laid down as follows:

"Where a contract is entered into for fraudulent or illegal purposes, the law refuses its aid to enable either party to disturb such parts as have been executed or carried into effect; and as to such parts as remain executory, it will not compel the contractor to perform his engagements or pay damages for non-performance; thus in both cases leaving the parties where it found them."

The same rule is laid down in Smith *vs.* Hubbs, 1 Fairfield, *supra.*

In Schermerhorn *vs.* Tallman, 14 N. Y. R., page 141, Denio, J., says:

"It (the law) will not listen to their (the parties') complaints against each other, but will leave them where their own acts have placed them."

In Howson *vs.* Hancock, 8 Term Reports, *supra*, Lord Kenyon says:

"No case can be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *particeps criminis*, an action has been maintained to recover it back again."

(2.) But the illegal scheme was carried out and fully executed as to the $13,980 sought to be recovered, with interest, from the corporation herein.

On the 8th of February, 1866, the deceased and his co-trustees of the corporation declared a dividend of 4 per cent. on the old stock, payable at the office of the company on the 20th of February. This amounted to exactly 20 per cent. on the new stock. At the same time they make a call of 20 per cent. on the new stock, payable at the same time and place as the dividend. The $13,980 dividend declared is then actually applied as payment and satisfaction of the $13,980 called on the new stock, and to be paid by deceased. This was done at his request, and he acted as a trustee and individually in doing it. (Record, folio 77½ and 78 as to dividend and call; same, folio 81 to 83 as to the payment.)

The court is now asked to aid the plaintiffs by setting aside what has been fully consummated by the parties in carrying out the illegal scheme and contract.

It is submitted that the scheme and contract were fully executed and consummated as to this dividend and call of 20 per cent.; and that the deceased, who was the more guilty party, who, in violation of his duty as trustee, was active and instrumental in involving this corporation in this illegal and disastrous scheme, is not entitled to recover from the corporation this $13,980, and interest, from February 20, 1866, or any part thereof. He has no *locus pœnitentiæ* as to this dividend and first call of 20 per cent. after this transaction of February 20, 1866.

2. The alleged right of action for the money sought to be recovered herein arises out of this illegal and fraudulent scheme, and the plaintiffs therefore cannot recover. *Ex turpi causa non oritur actio.*

Had the deceased paid or advanced money to the defendant on account of this illegal scheme, his recovery, if allowable at all, would have been by virtue of his original title

to the money and entirely independent of the fraudulent scheme. But the deceased did not pay or advance a dollar to the defendant.

The dividend was declared, with intent on the part of the deceased and the corporation, to aid in carrying out the illegal and dishonest scheme by applying it as payment of the first call on the new stock. It was declared and applied as part and parcel of this illegal and dishonest scheme. Except as a part of it the dividend would not have been declared. (Record, folios 77 to 80.)

Independent, outside of this scheme, the plaintiff's intestate, had no title to the $13,980, or any part of it. He can only make title to it by and through the scheme.

He can not and he does not make his cause of action in his complaint, or by evidence, except by setting forth and proving the illegal scheme and contract out of which it arises. (See Complaint, Record, folios 4 to 10, &c.; Findings, folio 77 to 83.)

There is no promise or obligation expressed or implied on the part of the defendant to pay to the deceased unless it arise out of this fraudulent enterprise, of which the intestate was the chief contriver and promoter, and to which he was an active party as trustee of the corporation on the one side, and individually on the other. It is respectfully submitted that the law does not permit him to recover against the corporation on such a cause of action.

IV. There is no Federal question involved in this suit.

The action was brought by the deceased plaintiff in the supreme court of the State of New York. It was tried in that court, and a recovery had. On appeal by the defendant, the court of last resort in that State decided that the plaintiff was not entitled to recover, and reversed the judgment of the supreme court and ordered a new trial. (57 N. Y. Report, 518.)

The plaintiff subsequently died. The action was con-

tinued in the State court in the name of his administrators. (Record, folio 31.) Afterwards, on their application, the suit was removed into the circuit court of the United States on the sole ground that the deceased was at his death, and his administrators were citizens and residents of the State of Illinois. (Record, folios 33 to 51; U. S. Revised Statutes, Section 639.)

The questions involved in the case concern the statutes under which the defendant below was organized, and the public policy and law of the State of New York. The court of last resort in that State has, after full argument and consideration, adjudged and determined that on the facts of this case the plaintiff below was not entitled to recover. This adjudication was made in this suit between the same parties and on the same facts presented to this court. The questions involved would be held in the courts of New York to be *res adjudicata* on a retrial.

It is confidently submitted that this court should, and, in accordance with the rule established by its own decisions, will, follow the decision of the court of appeals of New York in deciding the case.

Jefferson Branch Bank *vs.* Skelley, 1st Black, 436, 443.

Elmendorf *vs.* Taylor, 10 Wheaton, 152, 159.

Scipio *vs.* Wright, 101 U. S. R., 665, 675.

Township of Elmwood *vs.* Marcy, 92 U. S. R., 289, 294.

Fairchild *vs.* Gallatin, 100 U. S. R., 47, 50, &c.

The judgment of the circuit court should be reversed, and judgment ordered for the defendant below, with costs of suit.

FRANCIS KERNAN,
CHAS. S. LESTER,
*Counsel for Plaintiff in Error.*

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OFFICE SUPREME COURT U. S.
FILED
JAN 11 1881
JAMES H. McKENNEY, Clerk.

# Supreme Court of the United States.

THE CONGRESS AND EMPIRE SPRING COMPANY,
*Plaintiff in Error,*

*vs.*

DEXTER A. KNOWLTON, JR., ET AL., ADMINISTRATORS, &C.,
*Defendants in Error.*

## Brief for Defendants.

The Congress and Empire Spring Company is a corporation organized under the General Manufacturing Law of New York (chapter 40, Laws of 1848), with an original capital of $1,000,000, which was all issued in payment for property purchased by its Trustees, and became thereby full paid stock, not liable to assessments or further calls.

Laws of N. Y., 1853, ch. 333, § 2.

In 1866 the company became desirous of increasing the amount of its capital stock to $1,200,000.

The mode by which manufacturing corporations may increase their capital stock is prescribed by sections 21 and 22 of chapter 40 of the Laws of 1848, as follows:

"SECTION (21). Whenever any company shall desire to call a meeting of the stockholders, for the purpose of availing itself of the privileges and provisions of this act, or for increasing

or diminishing the amount of its capital stock, or for extending or changing its business, it shall be the duty of the Trustees to publish a notice, signed by at least a majority of them, in a newspaper in the county, if any shall be published therein, at least three successive weeks, and to deposit a written or printed copy thereof in the Post Office, addressed to each stockholder at his usual place of residence, at least three weeks previous to the day fixed upon for holding such meeting, specifying the object of the meeting, the time and place, when and where such meeting shall be held, and the amount to which it shall be proposed to increase or diminish the capital, and the business to which the company would be extended or changed; and a vote of at least two-thirds of all the shares of stock shall be necessary to an increase or diminution of the amount of its capital stock, or the extension or change of its business as aforesaid, or to enable a company to avail itself of the provisions of this act."

"SECTION (22). If, at any time and place specified in the notice provided for in the preceding section of this act, stockholders shall appear in person or by proxy, in number representing not less than two-thirds of all the shares of stock of the corporation, they shall organize by choosing one of the Trustees chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present in person or by proxy; and if, on canvassing the votes, it shall appear that a sufficient number of votes has been given in favor of increasing or diminishing the amount of capital, or of extending or changing its business as aforesaid, or for availing itself of the privileges and provisions of this act, a certificate of the proceedings showing a compliance with the provisions of this act, the amount of capital actually paid in, the business to to which it is extended or changed, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be increased or diminished, shall be made out, signed and verified by the affidavit of the chairman, and be countersigned by the secretary; and such certificate shall be acknowledged by the chairman and filed as required by the first section of this act; and when so filed, the capital stock of such corporation shall be increased or diminished to the amount specified in such certificate, and the business extended or changed as aforesaid; and the company shall be entitled to the privileges and provisions, and be subject to the liabilities of this act, as the case may be."

On the 11th of January, 1866, the Board of Trustees took the first step toward an increase, by resolving that the capital be increased two hundred thousand dollars, and that each

stockholder be allowed to take one share of new stock for each four shares held by him, upon payment of eighty dollars upon each new share, to receive a certificate for full paid stock (Record, fol. 57).

On the 8th of February, 1866, the scheme for increasing and disposing of the stock was further elaborated by directing the opening of books for subscriptions, ordering a call on the new stock, and providing for allotment among stockholders, and the preparation of a subscription agreement, pursuant to resolutions of the Board (fols. 58–69). This subscription agreement is in conflict with the 11th and 14th sections of the said Act of 1848, which provide as follows:

"Section 11. The President and a majority of the Trustees, within thirty days after the payment of the last instalment of the capital stock, so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the President and a majority of the Trustees; and they shall, within the said thirty days, record the same in the office of the County Clerk of the county wherein the business of the said company is carried on."

"Section 14. Nothing but money shall be considered as payment of any part of the capital stock, and no loan of money shall be made by any such company to any stockholder therein; and if any such loan shall be made to a stockholder, the officers who shall make it, or who shall assent thereto, shall be jointly and severally liable to the extent of such loan, and interest, for all the debts of the company contracted before the repayment of the sum so loaned."

Dexter A. Knowlton, plaintiff below, subscribed, through one Sheehan, for 699 shares of the proposed increase of capital, and paid thereon $13,980, receiving from the company a receipt in due form (fol. 63).

He refused to make further payments. The scheme was found to be a failure, and, at a stockholders' meeting on the 7th of August, 1867, was finally abandoned by the company (fol. 65): and bonds of the company were authorized to be issued in sufficient amount to retire and pay off the outstanding "receipts for payments" on new stock (fol. 67).

The measures for an increase of the capital stock, thus appear to have gone no further than a resolution of the Board of

Trustees providing for such increase, subscriptions upon certain terms by stockholders, and several calls for payments on account of such subscriptions.

No stock was created by a vote of the stockholders, and the filing of certificates and affidavits setting forth their proceedings as required by the law.

The company did not offer to pay off and retire the outstanding receipt for $13,980 held by Mr. Knowlton with its bonds.

The Board of Trustees, in January, 1867. a few months before the stockholders abandoned the scheme, passed a resolution forfeiting the 699 shares standing in Knowlton's name. This attempted confiscation explains the reason that bonds were not offered to him as well as the other holders of receipts for money paid upon subscriptions.

He, therefore, demanded repayment of his money, and, upon refusal, brought suit.

## POINTS.

### First.

If the special findings of the court below will support the judgment it must be affirmed.

U. S. Rev. Statutes, § 700.

Utley *v.* Donaldson, 94 U. S., 42.

### Second.

There was a total failure of consideration for the payment made by Knowlton, and the court below might properly have so held.

The steps taken by the company towards the increase of its capital stock, as shown in the record, were initiatory merely. They consisted of—

1st. A resolution of the Board of Trustees that the capital be increased; and that books be opened for subscriptions upon certain terms.

2d. Resolutions of the Board making a call of 20 per cent., and providing for opening the books at once, and for allotment of shares.

3d. The preparation and issue of a subscription agreement, pursuant to the resolutions of the Board of Trustees. Fols. 57–60.

No stock was created. It does not appear that the stockholders met and voted and caused the proper certificates to be made and filed in the office of the Secretary of State, pursuant to the requirement of the law. Statutes of N. Y., sec. 22 of the Act of 1848, *supra*.

The resolution passed August 7, 1867, by the stockholders speaks of this stock as intended to be added to the capital stock, and the Board of Trustees authorized the Executive Committee to adjust the claims of all persons holding receipts for payments, and the Executive Committee resolved to issue bonds in sufficient amount to pay off and retire the outstanding receipts for payments on new stock of the company (fols. 65–67).

The scheme, so far as developed, was therefore merely tentative. It was found not likely to prove successful, probably from a well founded doubt as to the power of the company to perform its agreement, and was abandoned.

There having been no stock created, there was none to forfeit, and the resolution of forfeiture was nugatory.

The money paid to the company was not affected by it. The subsequent action in regard to the "outstanding receipts for payments" was a waiver, if one was needed, of any prior default.

NOTE.—In the State Court there was some proof, and it was assumed that an increase of stock had been made. No such proof was made below. The case, in its present aspect, was therefore not presented to the State Court.

## Third.

The contract of the company was *ultra vires* and void. It had no power to deliver to subscribers full paid stock on receipt of eighty per cent. of its par value. The certificates might contain the statement that the shares were full paid, but neither against the company nor against creditors would such statement be conclusive.

Sections 10, 11, 14, Act of 1848.
Thomas *v.* RR. Co., 101 U. S., 78, 82, 83, 86.
Pittsburgh & Connellsville RR. Co. *v.* Stewart, 4 Penn. St., 54.
Neuse Riv. Nav. Co. *v.* Commrs. of Newbern, 7 Jones' Law (N. C.), 275.
Angell & Ames on Corporations, §§ 255, 527.
Hibernia T. Co. *v.* Henderson, 8 Serg. & Rawle (Pa.), 219.
Sturgis *v.* Stetson, 3 Phila. Rep., 304.

A void contract is not a good consideration for the payment of money, and money paid upon it may be recovered.

Dill *v.* Wareham, 7 Metc. (Mass.), 438.

## Fourth.

The ground taken by the court below will also sustain the recovery.

The scheme for the increase of the capital stock was in violation of the policy of the law, constructively fraudulent as to the public and stockholders not assenting to it. The subscription agreement was a contract which could not have been enforced against the company or against subscribers, and was rescinded by the defendant's intestate (Knowlton) while it was executory, who then became entitled to recover the money he had paid.

1. No stock had been issued. Receipts for payments to the amount of $86,500 on account of subscriptions were outstanding, showing that about half of the eighty per cent. had been paid when the company abandoned its scheme. Partial

performance only had taken place. The contract was still executory.

2 Bl. Com., 443.
2 Stephens' Com., 113.
Story on Contracts, § 18.
Fletcher *v.* Peck, 6 Cranch, 136.

2. All the elementary writers agree that while an illegal contract remains executory, money paid or goods delivered in partial performance of it may be recovered.

2 Comyn on Contracts, 109.
Chitty " " 553.
2 Parsons " " 1st Ed. 252.
Story " " 5 Ed., § 611.
Addison " " Am. Ed., § 1412.
2 Greenleaf on Ev., § 111.

Addison states the rule thus: "The law, so long as an illegal contract continues executory, implies from the person who has received money in furtherance of the execution of the contract a promise to refund it in favor of the party who paid the money and who repudiates the illegal transaction.

3. Aside from this case in the N. Y. Commission of Appeals, every English and every American case sustain the proposition so stated.

Walker *v.* Chapman, Lofft, 345.
Lowry *v.* Bourdieu, Douglas, 471.
Tappenden *v.* Randall, 2 Bos. & P., 466.
Hastelow *v.* Jackson, 8 Barn. & C., 221.
Bone *v.* Eckless, 1 Hurls. & Nor., 925.
Taylor *v.* Bowers, L. R., 1 Q. B. D., 291.
Ins. Co. *v.* Kip, 8 Cow. (N. Y.), 20.
Merritt *v.* Millard, 4 Keyes (N. Y.), 213.
Morgan *v.* Groff, 4 Barb. (N. Y.), 526.
Skinner *v.* Henderson, 10 Mo. Rep., 207.
Adams Ex. Co. *v.* Reno, 48 id. 268.
White *v.* Franklin Bk. 22 Pick. (Mass.), 184.
Lowell *v.* Boston & Lowell RR. Co., 23 id. 32.
Thomas *v.* City of Richmond, 12 Wall., 355.

(*a.*) In Taylor *v.* Bowers, Law Rep., 1 Q. B. D., *supra*, the action was to recover the value of certain personal property assigned for the purpose of defrauding creditors.

A verdict was had for the plaintiff with leave to move to enter a verdict for the defendant.

A rule was obtained accordingly on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant. The Queen's Bench sustained the verdict Lord COCKBURN delivering the opinion.

The defendant then appealed to the Court of Appeal where the judgment was affirmed.

Both courts agree that an illegal contract partially performed may be repudiated and the money paid upon it may be recovered. Lord Justice MELLISH in the Court of Appeal said: "If the illegal transaction had been carried out, the plaintiff himself, in my judgment, could not afterwards have recovered the goods. But the illegal transaction was not carried out; it wholly came to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done."

(*b.*) In Thomas *v.* The City of Richmond (*supra*), this court cites with approval the conclusion of Mr. FRERE in his note to Smith *v.* Bromley (Douglas' Rep., 4th ed., 696) that a recovery can be had as for money had

and received when the illegality consists in the contract itself and that contract is not executed; in such case there is a *locus poenitentiæ;* the *delictum* is incomplete and the contract may be rescinded by either party. And refers also to 2 Comyn on Contracts, 108–131; 3 Phillips on Evidence, 119; Chitty on Contracts, 553; 2 Greenleaf on Evidence, § 111.

(*c.*) While the unlawful purpose was still unexecuted there was a sufficient rescission by Knowlton. He refused to make further payments and thus evinced his repudiation of the scheme.

Presently, the company having failed to recognise his "outstanding receipt" for $13,980, he demanded payment of the money which followed by suit was a still more emphatic and complete assertion of his design to recede.

But when the company had itself retraced its steps no further action by Knowlton was necessary.

At any time prior to the final payment and delivery of the stock any stockholder could have enjoined the company from completing the illegal scheme.

*Vide* Story's Eq. Jur., § 298.

## Fifth.

The Commission of Appeals (57 N. Y. Rep., 530 *et seq.*), in its prevailing opinion, evinces a singular misconception of the character and significance of the cases cited in support of its judgment.

*Perkins* v. *Savage* (15 Wend, 412) was not an action brought to disaffirm an illegal contract. The contract had been performed, and a balance of the money advanced by the plaintiff remained unexpended.

Judge NELSON intimated, at page 414, that had the contract been repudiated before the money had been expended, the plaintiff could have availed himself of a *locus poenitentiæ* and recovered.

The head note of the reporter is an inaccurate statement of the decision, and misled the State court. It omits to say that the illegal purpose had been wholly performed.

So in *Bell ex parte*, 1 Maule & Selwyn, 751, Lord ELLENBOROUGH, before making the remark cited by the court, says: "This case does not fall within *Petrie* v. *Hannay* and *Faikey* v. *Reynous*, as described by Ch. J. EYRE in *Mitchell* v. *Cockburne*, 2 H. Bl., 379; *it is* to carry into effect the illegal contract itself."

And *Howson* v. *Hancock* (8 Term. Rep., 575) was an action *to recover money paid to the defendant, the winner upon an illegal wager, by the stakeholder, with the consent of the plaintiff.* Lord KENYON clearly meant that money paid in full performance and execution of an illegal contract cannot be recovered.

The case of *Burt* v. *Place* (6 Cow., 431) was one to which the remark of Lord KENYON was applicable, because it sought to enforce and compel performance of an illegal contract.

In *Smith* v. *Hubbs* (1 Fairf., 10 Me. 76), the contract was executed, and Judge MELLEN only asserts, having in mind the facts of the case before him, that the law will not permit the recovery of money paid upon an executed illegal contract, nor will it compel a contractor to perform his contract or pay damages for a refusal to perform.

The Commission of Appeals overlooked the case of *Morgan* v. *Groff*, 4 Barb., N. Y., 526 *et seq.*, in which Judge PAIGE reviews the cases, and states the result as establishing this rule:

"Where money has been paid on an illegal contract which has been executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid; but if the contract is executory and the party paying the money is desirous of rescinding the contract, he may do so and recover back his money by action of assumpsit for money had and received."

Judge LOTT is also in error, page 532, as to the character of the cases in which money or property paid or parted with upon an unexecuted illegal contract has been held recoverable. He misapprehends the cases by which the distinction between executed and executory contracts was established in England, and which have been uniformly followed here.

Judge LOTT is equally unfortunate, at page 535, in his reference to Otter *v.* Brevoort Petroleum Co. (50 Barb. N. Y. Rep., 255) as an authority upon the validity of the contract. No stock was subscribed for or offered to subscribers at less than par in that case. The company having become the owner of some of its own full-paid shares, sold them as it might lawfully do.

In this case, as now presented, the question of forfeiture does not arise. No new stock was created.

Record, fols. 57–59.

The dessenting opinion of Judge DWIGHT, p. 540 *et seq.*, is a correct view of the case, and accords with all previous authorities.

## Sixth.

The contention of the defendants here, briefly recapitulated, is

1st. That the proceedings by the company looking to an increase of its capital stock were inchoate and incomplete. No stock was created, and there was a total failure of consideration for the subscription.

2d. That the contract of the company was *ultra vires* and void, and the money paid upon it recoverable upon this ground.

3d. That the scheme for an increase and sale of stock was in violation of the spirit and policy of the law, was rescinded while it was executory, and that this action, which proceeds in disaffirmance of an unlawful contract, is well brought.

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OFFICE SUPREME COURT U.S.
FILED
JAN 13 1881
JAMES H. McKENNEY, Clerk.

# Supreme Court of the United States.

CONGRESS AND EMPIRE SPRING CO.
*vs.*
DEXTER A. KNOWLTON, JR., ET AL.

## Supplementary Point for Defts. in Error.

A suggestion is made by the plaintiffs in error that Mr. Knowlton did not pay the $13,980.

He bought Sheehan's dividend to that amount, and gave his note, payable in one year, which he paid before maturity.

All the stockholders who subscribed for the proposed new stock had their dividends credited on account of the first call. Those who did not subscribe were paid the dividend in cash. The company recognized its obligation for the dividend in giving its bonds to the amount of more than $80,000 to the holders of receipts for payments of calls.

Fols. 61–3; also at 81–3.

Judge Wallace, in his opinion, refers to these facts as conclusive, and says "the defendant has treated the dividend as though actually paid, not only in crediting it as a payment, but in dealing with other stockholders, and it is now too late to question its validity."

Fol. 102.

It is found that the company declared a dividend. The presumption is that it was properly declared. The court

does not find any fact which impeaches it. It is not to be inferred, in the absence of any such fact, that it was fictitious. The company is estopped by its repeated recognition of its validity, and by its payment to every one but Mr. Knowlton.

2nd. It is claimed by the plaintiffs in error that this court must follow the ruling of the N. Y. court because the company is a New York corporation and the policy of the law involved in the discussion is the "public policy" of New York.

The cases cited are the familiar cases in which this court holds that in the construction of local laws it will follow the decisions of state courts. But it is submitted that the policy of the law has not yet been held to be circumscribed by state lines.

The question is one of general law, involving the validity of a contract and the remedies of the parties, and to be determined by the principles of law of universal application.

Otis vs. National Bank, 100 U. S., 246, and cases cited.

The case comes here after what the state court considered a mistrial, and the questions with reference to which Judge Wallace, following the intimation of this court in Thomas vs. City of Richmond, and the express ruling of the highest English tribunal in Taylor vs. Bowers, was constrained to differ with the state court, are presented for final adjudication.

H. M. RUGGLES,
*Of Counsel.*